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No. 10962

7-4-05

10962

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE RAILROAD CREDIT CORPORATION, a Corporation,
Appellant,

vs.

FREDERICK H. ECKER, FRANK C. WRIGHT and ROBERT E. COULSON, the members of the Reorganization Committee, of the Western Pacific Railroad Co., Debtor,
Appellees.

and

THE WESTERN PACIFIC RAILROAD CORPORATION, a
Corporation,

Appellant,

vs.

THE RAILROAD CREDIT CORPORATION, a Corporation,
Appellee.

Transcript of Record

Upon Appeals from the District Court of the United States
for the Northern District of California,

Southern Division

FILED

APR 2 - 1945

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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San Francisco, Cal.

Attorney for Appellee, Reorganization
Committee of The Western Pacific Rail-
road Co.

In the District Court of the United States for
the Northern District of California
Southern Division

No. 26591-S

In Proceedings for the Reorganization of a
Railroad

In the Matter of

THE WESTERN PACIFIC RAILROAD COM-
PANY,

Debtor.

PROOF OF CLAIM AGAINST THE WESTERN
PACIFIC RAILROAD COMPANY, DEBTOR

1) Name, address and business claimant; The Railroad Credit Corporation, 805 Transportation Building, Washington, D. C.

(2) Total amount of claim: \$2,534,942.00 plus interest.

(3) Detailed statement of claim showing nature of claim and each item thereof, and date each item arose: See Exhibit A attached.

(4) Security or lien, if any, held for said claim: See Exhibit A attached.

(5) Copies of original documents to be submitted with claim. (Original promissory notes, contracts, orders, or other written documents, if any, forming the basis of claim should be copied and the copies attached to one copy of proof of claim: See Exhibits A-1, A-2, A-3, and A-4 attached.

(6) Amount, if any, heretofore paid on said claim: See Exhibit A attached. [1*]

(7) Details and amounts of set-offs or counter-claims against said claims: None.

(8) Net amount now due claimant: \$2,534,942.00 plus interest.

(9) Venue, title and number of suit or proceeding, if any, in which said claim is involved: None.

(10) Priority, if any, claimed for payment of the claim or any part thereof, and reasons therefore: Priority is claimed to the extent justified by the attendant facts and figures.

(11) The Western Pacific Railroad Company claim or correspondence file numbers, if any, relating to claim or any item thereof and to set-offs or counterclaims: None.

(12) Name and address of person authorized by claimant to receive and receipt for, on behalf of claimant, all dividends or payments: Mr. Arthur B. Chapin, Treasurer, The Railroad Credit Corporation, 805 Transportation Building, Washington, D. C.

(13) Name and address of attorney authorized to represent claimant in respect of said claim: Mr. Daniel Willard, Jr., Counsel, The Railroad Credit Corporation, 805 Transportation Building, Washington, D. C.

(14) If proof of claim is executed or verified by a person other than (1) claimant, if claimant is an individual, (2) member of firm, if claimant is a

*Page numbering appearing at foot of page of original certified Transcript of Record.

partnership, (3) president, vice president or treasurer, if claimant is a corporation, the reasons therefor and character of the authority of the person so executing or verifying the proof of claim are: None.

Dated at Washington, D. C., September 10, 1935.

THE RAILROAD CREDIT
CORPORATION,

By E. R. WOODSON

Its Vice President. [2]

United States of America,
District of Columbia—ss.

E. R. Woodson, being first duly sworn, on oath deposes and says that he is the Vice President of Claimant herein; that he has been duly authorized to execute, verify and file the foregoing proof of claim; that he has knowledge of the facts therein stated; that the same are true and correct; and that the amount now due claimant from The Western Pacific Railroad Company, Debtor, on claims, after allowing all credits, set-offs and counterclaims, is \$2,534,942.00 plus interest.

E. R. WOODSON

Subscribed and sworn to before me this 10 day of September, 1935.

LOUIS J. LITY GUALD

Notary Public.

My commission expires Jan. 10, 1938. [3]

EXHIBIT A-1

A certified copy of the Marshalling and Distributing Plan, 1931.

W. J. KANE,
Secretary.

Before The
Interstate Commerce Commission

Fifteen Per Cent Case, 1931

Ex Parte No. 103

In the Matter of Increases in Freight Rates
and Charges

CONTRACT

By and Between the Rail Carriers Participating in
the Plan Known as the Marshalling and Distributing Plan, 1931, with each other

and with

The Railroad Credit Corporation [4]

Form No. 1B. (12-16-31)

Assent and Agreement

In consideration of One Dollar and other good and valuable consideration to it in hand paid by each of the several carriers assenting to the Marshalling and Distributing Plan, 1931, receipt whereof is hereby acknowledged, and in further consideration of the assent and agreement of each of said carriers to become bound by said Plan, The Railroad Credit Corporation, having been there-

Exhibit A-1—(Continued)

unto duly authorized by resolution of its Board of Directors, a certified copy of said resolution, marked "Exhibit A," being hereto attached, hereby assents to said Plan and agrees to be bound by all its terms and conditions.

THE RAILROAD CREDIT
CORPORATION,

By E. G. BUCKLAND

President.

Attest:

(Seal)

DANIEL WILLARD, JR.

Secretary. [5]

Form No. 1C. (12-16-31)

Whereas, This Corporation was created and organized by common carriers by railroad for the purpose of carrying out and facilitating the operation of the Marshalling and Distributing Plan, 1931,

Now, Therefore, be it

Resolved

(1) That the President of this Corporation be and he is hereby authorized to execute in the name and on behalf of this Corporation the Assent and Agreement to said Marshalling and Distributing Plan, 1931, in the form submitted at this meeting and marked by the Secretary for identification, with such changes therein and additions thereto as may be made by him upon advice of counsel; and the Secretary is authorized to affix the corporate seal thereto and attest the same;

Exhibit A-1—(Continued)

(2) That, when sufficient assents have been given to said Plan to make it practically operative, the President of this Corporation be and he is hereby authorized to agree that sufficient assents have been so given.

I Hereby Certify that the foregoing is a true and correct copy of a resolution presented to and adopted by the Board of Directors of The Railroad Credit Corporation at a meeting of said Board duly called and held at New York, New York, the 16th day of December, 1931, a quorum being present and taking the above action.

(Seal)

DANIEL WILLARD, JR.

Secretary. [6]

Before the
Interstate Commerce
Commission

Fifteen Per Cent Case, 1931

Ex Parte No. 103

In the Matter of Increases in Freight
Rates and Charges

ASSENT

Whereas, in the above entitled proceeding, the Interstate Commerce Commission, on the 16th day of October, 1931, filed its report proposing increases in certain specified freight rates, the revenues from such increases to be marshalled for the purpose of avoiding defaults in the payment of fixed interest obligations and to stabilize the railroad industry; and

Exhibit A-1—(Continued)

Whereas, in such report the Commission suggested that a plan for so marshalling the fund arising from the proposed increase in rates should be worked out by the carriers and submitted for the Commission's approval; and

Whereas, on the 19th day of November, the carriers having worked out such a plan, the Association of Railway Executives filed in this proceeding its petition submitting for the Commission's approval [7] the proposed plan together with a draft of a proposed charter for a corporation to carry out and administer the plan together with a draft of proposed by-laws for such corporation; and

Whereas, on the 28th day of November, 1931, argument in respect to such petition and the plan therewith submitted was heard by the Commission; and

Whereas, on the 5th of December, 1931, the Commission rendered its decision thereon in which it says:

For the reasons above set forth, and because we desire to act promptly in this proceeding, in accordance with the duties imposed and the authority conferred upon us by the Interstate Commerce Act, and avoid delays which will be injurious to the general public, including the carriers, we hereby modify our original report to the extent of relieving the carriers from the necessity of complying with the pooling plan therein described. This will leave them free to apply in the premises their own loaning plan, but, since use of the latter plan will not be

Exhibit A-1—(Continued)

pooling, within the meaning of that term as used in section 5 (1) of the Interstate Commerce Act, and because loans by and between common carriers, as such, have not been included within the jurisdiction conferred upon us by Congress, we neither approve nor disapprove either the loaning plan or the agency the carriers say they expect and intend to use in making that plan effective. However, we rely on them to apply the funds to be derived from the authorized increases in rates in aid of financially weak railroads in [8] accordance with the purposes expressed in our original report and in the instant application pursuant thereto and the arguments thereon presented; and

Whereas it is now desired by the carriers to perfect and to put into operation the plan presented to the Commission as above stated as a means of accomplishing the purposes of the Commission as described in its original report herein:

Now, therefore, the..... company, duly authorized thereto by its Board of Directors or its Executive Committee, hereby assents to the plan, a draft of which is hereto attached, being in substance the plan presented to the Commission by the Association of Railway Executives with its said petition filed with the Commission on the 19th day of November, 1931, in the above entitled proceeding, and, in consideration of the benefits expected to accrue to it thereunder and

Exhibit A-1—(Continued)

of corresponding obligations entered into by other carriers, covenants and obligates itself to the Corporation mentioned in said plan and to the other assenting carriers to comply with all the terms and requirements of said plan and reserves to itself all of the rights and benefits that may accrue to it thereunder. This assent is expressly made subject to paragraph sixteen of said plan, which reads as follows:

“This plan shall not become effective as to any carrier unless it agrees that a sufficient [9] number have assented to make it practically operative, but shall become effective as to those so agreeing at a date not later than January 1, 1932, to be fixed by them.”

.....

Company

[Seal] By
Its President

Attest:

.....

Secretary. [10]

Before The
Interstate Commerce Commission
Fifteen Per Cent Case, 1931

Ex Parte No. 103

In the Matter of Increases in Freight Rates
and Charges

Plan providing for the disposition of the increase in revenue growing out of the increases in rates on commodities and classes of traffic specified in the

Exhibit A-1—(Continued)

Appendix to the Commission's report, filed December 5, 1931, and to be known as the Marshalling and Distributing Plan, 1931.

1. A corporate agency to be created and organized, under the name of The Railroad Credit Corporation, for the purpose of collecting, receiving and administering the fund growing out of the increase in rates scheduled by the Commission for an increase in the Appendix to its report in this proceeding, filed December 5, 1931. It shall be incorporated under the laws of the State of Delaware. Its administrative offices will be located in the City of Washington, D. C. A draft of its proposed charter, or Certificate of Incorporation, and [11] of its proposed by-laws is hereto attached. It is hereinafter referred to as the Corporation.

2. All carriers by railroad or by water, rates of which are subject to the jurisdiction of the Interstate Commerce Commission, may file tariffs providing for the rate increases specified in the Appendix to the Commission's report; and all such carriers by railroad assenting to the plan as in the next succeeding paragraph provided shall be participants in the plan as hereinafter indicated; but no carrier already in default as to its fixed interest obligations, or which is in receivership, or which derives less than fifty per cent of its revenues from freight transportation, and no carrier by water, shall either contribute to, or receive from, the fund any amount whatever. The participants in the plan are hereinafter referred to as the participating carriers.

Exhibit A-1—(Continued)

3. Any carrier eligible to participate, except as limited by the next preceding paragraph, shall, upon execution of its written assent to this plan, become and be a participating carrier hereunder and obligated to make payments into the fund in the amounts and at the times hereinafter specified, and shall thereby confer upon the Corporation full power and authority to deal with, administer and apply the fund, so paid to it, to and for the purposes of the plan and to do and perform any and all other things necessary or appropriate to carry out and effectuate its purposes.

4. The amount to be paid into the fund, by each of the participating carriers, shall be the gross revenue received by it from the increase of rates [12] scheduled by the Commission to be increased in the Appendix to its report in this proceeding, filed December 5, 1931; provided, however, that if any participating carrier is required to pay a tax or taxes because of the receipt by it of revenue from the proposed increase in rates, it shall, upon payment thereof, be entitled to withdraw from the Corporation, and the Corporation shall refund to it, the amount of such tax or taxes. In no case shall a participating carrier be required to pay into the fund any amount (except interest on delayed payment) not derived from the increase then in force in rates made pursuant to the Commission's proposal.

5. The amount derived from the increase in rates shall, as nearly as possible, be ascertained and stated

Exhibit A-1—(Continued)

by each participating carrier within forty days after the month in which it accrues, and shall be paid to the Corporation within ten days after the expiration of the forty-day period, to constitute a fund for the purposes hereinafter specified. Similar payments into the fund shall thereafter be made monthly and, if not paid when due, the amount thereof shall bear interest at the rate of eight per cent per annum. Monthly report of such payments shall be made by each participating carrier to the Interstate Commerce Commission.

6. The expense of administration incurred by the Corporation shall be paid out of the fund.

7. The Corporation shall use the fund so provided to carry out the Commission's purpose to prevent, so far as practicable, defaults by railroad companies in their fixed interest obligations. To that end, and subject to the exceptions hereinafter [13] stated, it shall, upon the application of any participating carrier, if the amount in the fund at the time is sufficient for the purpose, make to the applicant such loan or loans therefrom as are necessary to enable it to meet its fixed interest obligations and to avoid default thereon; but no advance or loan from the fund shall be made for any other purpose and no advance or loan shall be made—

(a) To a carrier then in default or in receivership;

(b) To a carrier which derives less than fifty per cent of its revenues from freight transportation;

Exhibit A-1—(Continued)

(c) To a carrier which is able to meet its fixed interest obligations from its earnings, other income or other resources;

(d) To a carrier which, with the aid of the loan from the Corporation, would still be unable to meet its fixed interest obligations or to avoid a default.

(e) To a carrier by water;

(f) To a carrier which has not complied in full with its obligations under paragraph 4 of this plan.

(g) After May 31, 1933.

In determining the amount of the deficiencies in the earnings of an applicant and the necessity for making it a loan, the amount actually expended for maintenance (but not the amount charged to operating expenses on account of depreciation and retirements) in the period from July 1, 1930, to June 30, 1931, shall be used as the maximum of its maintenance charges, unless in the discretion of the Corporation a different period should in a special case be justified. [14]

8. Advances from the fund shall be represented by obligations of the participating carrier to the Corporation, bearing interest at the then current rediscount rate of the Federal Reserve Bank in the New York District, the interest rate to be adjusted quarterly, on the first days of January, April, July and October of each year, to such rediscount rate as then exists. The interest shall be payable semi-annually and the obligation shall fall due at such time as may be agreed upon between the applicant and the Corporation, not exceeding two years, hav-

Exhibit A-1—(Continued)

ing due regard to the accomplishment of the purpose of preventing default in the payment of fixed interest obligations, but renewable for an additional period of not exceeding two years, at the discretion of the Corporation.

No recipient of any loan made from the fund shall declare or pay any dividend until the loan has been fully repaid principal and interest, except in cases where, by contract or otherwise, the payment of a specific dividend is a fixed charge, which would, if not paid, result in a default in respect thereto.

9. In making loans from the fund the Corporation shall take as security the best available collateral, including, if required by the Corporation, the pledge of the amounts due or to become due an applicant on distribution as provided in paragraph 14 and with discretion to the Corporation, in any case of important public interest, to relax the requirements of this paragraph.

10. The Corporation shall make monthly reports to the Interstate Commerce Commission and to the [15] participating carriers, of its receipts, loans and disbursements, together with a summary of its current financial condition.

11. The Corporation shall have the power and authority to require reports from the participating carriers, and shall have the right of access to and audit of their books and records for the purposes of this plan.

12. The Corporation shall render to the Interstate Commerce Commission such periodical reports as the Commission may request, and the Commis-

Exhibit A-1—(Continued)

sion at all times shall have access to the books and records of the Corporation for inspection and audit.

13. Each railroad carrier making a separate operating report to the Interstate Commerce Commission, except those excluded from participation by paragraph 2 hereof, shall be under obligation to contribute to the fund and shall, subject to the provisions of paragraph 7, have the right to apply for and receive loans therefrom.

14. At least once in every six months the Board of Directors of the Corporation shall review its needs for funds to carry out and accomplish its purposes; and, if they shall at any time find that there is a balance in its hands over and above its requirements, such balance shall be distributed to the participating carriers in the proportion in which their respective earnings (not including interest paid in on delayed payments), less any amount repaid to them, respectively, as a refund for taxes, contributed to the fund, except that any distributable amount inuring to a carrier indebted [16] to the fund, instead of being paid to it, shall be credited on its obligation.

15. The obligation imposed by this plan to make payments into the fund shall continue in effect until such payments shall have been made in respect to all traffic moved up to and including March 31, 1933, and the Corporation shall exist and continue to function only for such period thereafter as may be necessary to collect all outstanding loans and obligations, make distribution of the remaining funds to the participating carriers in the proportion

Exhibit A-1—(Continued)

above mentioned, and generally to wind up and settle its affairs.

16. This plan shall not become effective as to any carrier unless it agrees that a sufficient number have assented to make it practically operative, but shall become effective as to those so agreeing at a date not later than January 1, 1932, to be fixed by them. [17]

CERTIFICATE OF INCORPORATION

of

THE RAILROAD CREDIT CORPORATION

First. The name of this corporation is The Railroad Credit Corporation.

Second. Its principal office in the State of Delaware is located at No. 100 West Tenth Street, in the City of Wilmington, County of New Castle. The name and address of its resident agent is The Corporation Trust Company, No. 100 West Tenth Street, Wilmington, Delaware.

Third. The nature of the business or objects or purposes proposed to be transacted, promoted or carried on by this corporation are as follows:

(a) To finance or participate in financing, through provision of credits (directly or indirectly) or otherwise, of common carriers by railroad throughout the continental United States, in such manner and on such terms as may seem expedient.

(b) To subscribe for, purchase, acquire, take, own, hold, buy, sell, assign, dispose of, transfer, pledge, hypothecate, mortgage, exchange and gen-

Exhibit A-1—(Continued)

erally deal and trade in and with securities, shares of stock, bonds, mortgages, debentures, notes, commercial paper, certificates of interest, certificates of deposit, certificates of indebtedness, bills and accounts receivable, evidence of indebtedness, contracts, obligations and investments of all kinds, whether secured or unsecured, and to loan money on the security of any thereof, or without security, and to enter into contracts with others for joint participation in the purchase, issuance and sale thereof, and to make advances upon consignments of merchandise and commodities, and to hypothecate all such merchandise and commodities as security; and with power to transact all of the commercial and financial transactions pertaining to any of the businesses herein provided for.

(c) To purchase or otherwise acquire securities, assets and properties of every kind and description, including real estate, or any interest therein, at judicial, judiciary, trustee's, pledgee's, mortgagee's or liquidating or public or private sales of any kind, or tax sales and to carry on a general liquidation and realization business.

(d) To purchase, or in any manner acquire, and to hold, deal in, lease, mortgage and incumber real estate, both improved and unimproved, or any interest therein, wheresoever situate, and to subdivide, develop and improve the same for the purposes of sale or otherwise, and to invest, trade, deal in and deal with goods, wares and merchandise and real and personal property of every class and description.

(e) To organize, or cause to be organized, under

Exhibit A-1—(Continued)

the laws of the State of Delaware, or of any other State, Territory, or country, or the District of Columbia, a corporation or corporations, for the purpose of accomplishing any of the objects for which this corporation is organized, or for any other purpose or purposes, and to subscribe to the capital stock of and/or to make loans or advances to, or otherwise finance, such corporation or corporations, and to dissolve, wind up, liquidate, merge or consolidate any such corporation or corporations. [19]

(f) To borrow money for the purpose of meeting the operating expenses of the corporation, and to issue its obligations therefor.

(g) To do any and all things herein set forth, and in addition such other acts and things as are incident or conducive to the attainment of the purposes of this corporation, or any of them, to the same extent as natural persons lawfully might or could do in any part of the world, in so far as such acts are not inconsistent with the provisions of the laws of the State of Delaware.

The foregoing clauses shall be construed as expressing both objects and powers, and it is hereby expressly provided that the foregoing enumeration of specific powers shall not be held to limit or restrict in any manner the powers of this corporation, and are in furtherance of, and in addition to, and not in limitation of, the general powers conferred by the laws of the State of Delaware.

It is the intention that the purposes, objects and powers specified in this paragraph Third and all subdivisions thereof shall be limited and restricted to carrying out and facilitating the operation of

Exhibit A-1—(Continued)

the Marshalling and Distributing Plan, 1931, hereinafter referred to in paragraph Eleventh.

Fourth. The total number of shares of stock which the corporation shall have authority to issue is twelve and the par value of each of said shares is One Hundred Dollars (\$100.00) amounting in the aggregate to Twelve Hundred Dollars (\$1,200.00).

Fifth. The amount of capital with which this corporation will commence business is Twelve Hundred Dollars (\$1,200.00). [20]

Sixth. The names and places of residence of the incorporators are as follows:

Names	Residence
C. S. Peabbles	Wilmington, Delaware
L. E. Gray	Wilmington, Delaware
L. H. Herman	Wilmington, Delaware

Seventh. The names and places of residence of the first board of directors shall be as follows:

Names	Residence
J. J. Bernet	Cleveland, Ohio
E. N. Brown	New York, N. Y.
E. G. Buckland	New Haven, Conn.
A. J. County	St. Davids, Pa.
P. E. Crowley	Mt. Vernon, N. Y.
L. A. Downs	Chicago, Ill.
G. B. Elliott	Wilmington, N. C.
A. D. McDonald	New York, N. Y.
J. J. Pelley	New Haven, Conn.
B. M. Robinson	Washington, D. C.
H. A. Scandrett	Evanston, Ill.
G. M. Shriver	Pikesville, Md.

Exhibit A-1—(Continued)

Eighth. The existence of this corporation is to continue until December 31, 1937.

Ninth. The private property of the stockholders of this corporation shall not be subject to the payment of corporate debts to any extent whatever.

Tenth. The number and qualifications of directors of this corporation and the method of nominating them shall be fixed and may be altered from time to time, as may be provided in the by-laws. In case of vacancies in the board of directors the [21] latter may elect directors to fill such vacancies, pursuant to the provisions of the by-laws, to hold office until the next annual meeting of the stockholders and until their respective successors shall have been duly elected and qualified.

Eleventh. This corporation is organized by common carriers by railroad in continental United States for the purpose of carrying out and facilitating the operation of the plan worked out by said carriers in response to the suggestion of the Interstate Commerce Commission in Ex Parte 103, and known as the Marshalling and Distributing Plan, 1931, for marshalling, through collections by this corporation from the several carriers as provided in said plan, revenues derived from the increases in rates and charges authorized in the report filed December 5, 1931, in Ex Parte 103, also from any modifications thereof, or additions or supplements thereto, and for distributing, through loans to carriers in need thereof under such plan, such part or all of the funds so collected and accumulated as may be required for this purpose; and the board of di-

Exhibit A-1—(Continued)

rectors is hereby authorized and empowered to take any and all action and to exercise any and all of the powers of this corporation which it may, in its discretion, deem advisable or proper to carry out the purposes aforesaid, whether resulting in profit or not. No dividends shall be declared or paid on the capital stock of this corporation.

In furtherance, and not in limitation, of the powers conferred by statute, the board of directors is expressly authorized: [22]

(a) To fix, determine and vary from time to time the amount to be maintained as surplus and the amount or amounts to be set apart as working capital.

(b) To make, amend, alter, change, add to or repeal by-laws for this corporation, without any action on the part of the stockholders. The by-laws made by the board of directors may be amended, altered, changed, added to or repealed by the stockholders.

(c) To sell, assign, convey and otherwise dispose of any part of the property, assets and effects of this corporation, in the regular course of business, on such terms and conditions as it shall deem advisable, without the assent of the stockholders in writing or otherwise; and also to sell, assign, transfer, convey and otherwise dispose of the whole or substantially the whole of the property, assets, effects, franchises and good will of this corporation on such terms and conditions as it shall deem advisable, but only with the assent in writing or pursuant to the affirmative vote of the holders of not

Exhibit A-1—(Continued)

less than the majority in interest of the stock then outstanding but in any event not less than the amount required by law.

(d) To receive from time to time, without assent or other action of the stockholders of this corporation, subscriptions for, and to sell any or all of the then unissued capital stock of this corporation.

All of the powers of this corporation, in so far as the same lawfully may be vested by this certificate in the board of directors, are hereby conferred upon the board of directors of this corporation. [23]

No director or officer of this corporation shall be held accountable to any stockholder or creditor of this corporation, or to anyone whomsoever, for any loss, claim or liability resulting from any action taken or power exercised in good faith hereunder.

If the by-laws of this corporation shall so provide the stockholders and directors shall have power to hold their meetings either within or without the State of Delaware, and to have one or more offices outside the State of Delaware; to keep the books and records of this corporation (except as otherwise provided by the laws of the State of Delaware) outside of the State of Delaware, and at such place or places as may from time to time be designated by the board of directors.

The accounts and books of this corporation, or any of them, shall be open to the inspection of any stockholder during business hours.

Twelfth. In the absence of fraud no contract or transaction between this corporation and any other association or corporation shall be affected by

Exhibit A-1—(Continued)

the fact that any of the directors or officers of this corporation are directors or officers of such other association or corporation, provided that such contract or other transaction shall be authorized or ratified by the assent of at least seven of the directors of this corporation not so interested.

Thirteenth. Except where other notice is specifically required by statute written notice only of any stockholders' meeting given as provided in the by-laws shall be sufficient without publication or other form of notice. [24]

Fourteenth. Any officer elected or appointed by the board of directors, or by the stockholders, or any member of any committee, may be removed at any time, with or without cause, in such manner as shall be provided in the by-laws of this corporation.

Fifteenth. This corporation may in its by-laws make any other provisions or requirements for the management or conduct of the business of this corporation, provided the same be not inconsistent with the provisions of this certificate, or contrary to the laws of the State of Delaware or of the United States.

Sixteenth. This corporation reserves the right to amend, alter, change, add to or repeal any provision contained in this certificate of incorporation, in the manner now or hereafter prescribed by statute, and all rights conferred on officers, directors and stockholders herein are granted subject to this reservation: Provided, however, that wherever in this certificate or by the laws of the State

Exhibit A-1—(Continued)

of Delaware the written consent or affirmative vote is required of the holders of a designated proportion of the capital stock of this corporation to any specified act or thing, then and in that event any amendment, alteration, change, addition to or repeal of any such provision shall require the written consent or affirmative vote of the holders of such designated proportion of the capital stock of this corporation.

We, the undersigned, being each of the incorporators hereinbefore named for the purpose of forming a corporation to do business, both within and without the State of Delaware, and in pursuance of the General Corporation Law of the State of Delaware, being Chapter 65 of the Revised Code of Delaware, and the acts amendatory thereof, and supplemental thereto, do make and file this certificate, hereby declaring and certifying that the facts herein stated are true, and accordingly have hereunto set our hands and seals, this.....day of December, 1931.

C. S. PEABBLES,

L. E. GRAY,

L. H. HERMAN.

In presence of

Harold E. Grantland.

State of Delaware

County of New Castle—ss.

Be It Remembered, that on thisday of December, 1931, personally came before me, Harold E. Grantland, a Notary Public for the State of Delaware, C. S. Peabbles, L. E. Gray and L. H.

Exhibit A-1—(Continued)

ers to order and act as chairman thereof. In case neither the president nor a vice president is present, any stockholder present may call the meeting to order, and the stockholders present may elect a chairman of such meeting.

The secretary of the corporation shall act as secretary at all meetings of the stockholders. In his absence the chairman may appoint any person to act as secretary.

Section 5. At each meeting of the stockholders every stockholder shall be entitled to vote in person or by proxy appointed by an instrument in writing subscribed by such stockholder or by his duly authorized attorney and delivered to the judges of election at the meeting, and he shall have one vote for each share of stock registered in his [28] name at the time of the closing of the transfer books for said meeting. No share of stock shall be voted on at any election which has been transferred on the books of the corporation within twenty (20) days next preceding such election. The vote for directors, and, upon the demand of any stockholder, the vote upon any question before the meeting, shall be by ballot.

Section 6. All elections of directors and all votes where a ballot is required shall be conducted by two judges of election who shall be appointed by the board of directors; but, in the absence of such appointment by the board of directors, the chairman of the meeting shall appoint such judges who shall not be directors or candidates for office of director.

Exhibit A-1—(Continued)

Section 7. Of the total number of directors to be elected at the annual meeting of stockholders ten shall be nominated by districts as provided in this Section, and one shall be nominated by the board of directors of The American Short Line Railroad Association. For the purposes of such nomination, the continental United States shall be divided into three districts, known as the Eastern District (including New England), the Southern District and the Western District.

The stockholders shall nominate one person for director at large. There shall be no other nominations for the board of directors

The Eastern District shall be bounded by the Atlantic Seaboard from the Canadian boundary to Norfolk, Virginia, by the main line of the Norfolk and Western Railway from Norfolk, Virginia, to [29] Kenova, West Virginia, by the main line of the Chesapeake & Ohio Railway from Kenova, West Virginia, to Cincinnati, Ohio, by the Ohio River from Cincinnati, Ohio, to Cairo, Illinois, by the Mississippi River from Cairo, Illinois, to the mouth of the Illinois River at or near Grafton, Illinois, by the Illinois River from Grafton, Illinois, to Pekin, Illinois, by a line south and east of the Atchison, Topeka and Santa Fe Railway from Pekin, Illinois, through Joliet and Streator, Illinois, to Chicago, Illinois, by a line drawn from Chicago, Illinois, to include the Southern Peninsula of Michigan, and thence following the Canadian boundary to the Atlantic Seaboard; including, however, the Norfolk and Western Railway, the Chesapeake & Ohio Rail-

Exhibit A-1—(Continued)

way, the Canadian National Railways and the Virginian Railway.

The Southern District shall be bounded by the Atlantic Seaboard on the east, by the Eastern District on the north, by the Mississippi River on the west, and by the Gulf of Mexico on the south.

The Western District shall be bounded by the Eastern District and the Southern District on the east, by the Gulf of Mexico and the Mexican boundary on the south, by the Pacific Ocean on the west, and by the Canadian boundary on the north.

Each Class I common carrier by railroad shall be deemed a member of the district in which its line of railroad is located, or if located in more than one district, of the district in which the greater portion of the main-line mileage of its system is located.

Five directors shall be nominated by the members of the Eastern District, one of said five directors being from New England; three directors shall be nominated by the members of the Western District; and two directors shall be nominated by the members of the Southern District.

Not more than fifty (50) nor less than fifteen (15) days prior to the date of the annual meeting of the stockholders, the secretary of the corporation shall send to each Class I common carrier by railroad and to The American Short Line Railroad Association a form of vote for nominations for directors, stating the number of directors to be nominated by the members of each district and by The

Exhibit A-1—(Continued)

American Short Line Railroad Association. The recipients thereof shall thereupon name the person or persons (not more than the number specified by the secretary) proposed by them under the provisions of this Section as the nominee or nominees for director or directors, and return such vote to the secretary. Each Class I railroad in voting for its nominee, or each of its said nominees, shall be entitled to a voting power proportional to the amount it has paid into said corporation, less any distribution theretofore made.

The secretary shall canvass the nominating votes of the members of each district or class of railroads received by him prior to such annual meeting and shall report the same to the stockholders at the meeting. The five persons (one of whom shall be from New England) receiving the most nominating votes in the Eastern District shall be the nominees of that district. The three persons receiving the most nominating votes in the [31] Western District shall be the nominees of that district. The two persons receiving the most nominating votes in the Southern District shall be the nominees of that District.

Section 8. Written notice of the annual or any special meeting of the stockholders, stating the time and place of such meeting, shall be mailed, postage prepaid, at least ten (10) days before such meeting, to each stockholder at such address as appears on the stock books of the corporation or at his last known post-office address.

Every stockholder who shall attend any meeting

Exhibit A-1—(Continued)

of stockholders in person or by proxy shall be deemed to have waived notice of such meeting, and if any stockholder shall, in person or by attorney thereunto authorized in writing, or by telegraph, cable, radio or wireless, waive notice of any meeting, whether before or after such meeting be held, notice thereof need not be given to him. Notice of any adjourned meeting of the stockholders shall not be required to be given except when expressly required by law.

Section 9. A complete list of the stockholders entitled to vote, arranged in alphabetical order with the address of each and the number of shares held by each, shall be prepared by the secretary at least ten (10) days before every election and shall be open at the place where said election is to be held for said ten (10) days to the examination of any stockholder, and shall be produced and kept at the time and place of election during the whole time thereof, and subject to the inspection of any stockholder who may be present. [32]

Section 10. Special meetings of the stockholders for any purpose or purposes, other than those regulated by statute, shall be called by the president or a vice president or the secretary whenever the board of directors shall so direct, and shall also be called at the request in writing of stockholders owning one-sixth of the shares of the capital stock of the corporation then issued and outstanding. Any such request shall state the purpose or purposes of the proposed meeting.

Exhibit A-1—(Continued)

Section 11. The business transacted at a special meeting shall be confined to the object or objects stated in the call.

Section 12. Written notice of any special meeting of the stockholders stating the time, place and object thereof shall be mailed, postage prepaid, at least ten (10) days before such meeting to each stockholder at such address as appears on the stock books of the corporation or at his last known post-office address.

ARTICLE IV.

Directors

Section 1. The property, business, and affairs of the corporation shall be managed by its board of directors, which shall consist of twelve members, none of whom need be a stockholder, but all of whom, except the director who is president, shall be an officer or director of a common carrier by railroad or of an association of common carriers by railroad. The number of directors may be altered by an amendment to these by-laws. The directors elected at the first meeting of the incorporators, and at each annual meeting thereafter, shall hold office until the next annual meeting and until their successors are duly elected and qualified. No compensation shall be paid to any director for his services as director.

Section 2. The board of directors may hold their meetings and may have one or more offices and keep the books of the corporation, except the original or duplicate stock ledger, at such place or places in the State of Delaware or outside of the

Exhibit A-1—(Continued)

State of Delaware as they may from time to time determine.

Section 3. In addition to the powers and duties by these by-laws expressly conferred upon them, the board of directors may exercise all such powers of the corporation and do all such lawful acts and things as are not by statute or by the certificate of incorporation or by these by-laws directed or required to be exercised or done by the stockholders.

ARTICLE V.

Meetings of The Board

Section 1. For the purpose of organization and otherwise each newly elected board of directors shall hold a regular meeting on the day of, but following, the annual meeting of the stockholders, or at such later time as shall be fixed by vote of the stockholders at the annual meeting, or they may meet at the place and time for the next regular meeting of the board of directors, and no notice of such meeting shall be necessary to the newly [34] elected directors in order legally to constitute the meeting.

Section 2. At all meetings of the board of directors seven directors shall constitute a quorum for the transaction of business, and the act of a majority of the directors present at any meeting at which there is a quorum shall be the act of the board of directors, except as may be otherwise specifically provided by statute or by the certificate of incorporation or by these by-laws. No loan

Exhibit A-1—(Continued)

shall be made by the corporation unless authority therefor be given at a meeting by a majority vote of the entire board of directors.

Section 3. Regular meetings of the board shall be held monthly at such time and place as shall be designated in the call for the meeting. Five (5) days' notice to each director personally or by mail or by telegraph or telephone shall be given of all regular meetings. (Amended Oct. 19, 1933—See margin)

[Marginal Note]: Section 3. Except as otherwise ordered by the directors or the Executive Committee, regular meetings of the Board shall be held monthly at such time and place as shall be designated in the call for the meeting. Five (5) days' notice to each director personally or by mail or by telegraph or telephone shall be given of all regular meetings.

Section 4. Special meetings of the board may be called by the president on five (5) days' notice to each director personally or by mail or by telegram or telephone, unless the president shall deem a shorter notice, but not less than two (2) days, expedient. Special meetings shall also be called by the president or secretary in like manner on the written request of any two directors.

Section 5. All regular and special meetings of the board except as otherwise herein provided shall be held at such place and at such time as shall be specified in the call of said meeting or in the waiver of notice thereof. [35]

Exhibit A-1—(Continued)

ARTICLE VI.

Committees

All committees designated or appointed by the board of directors shall keep regular minutes of their proceedings and report the same to the board at its next regular meeting.

ARTICLE VII.

Officers

Section 1. At the first meeting of the directors elected by the incorporators such directors shall elect one of their number as president and at the first meeting after each annual meeting of the stockholders the board of directors shall elect from their number as president the person elected by the stockholders as director at large; and they shall also elect one or more vice presidents, a treasurer and a secretary, none of whom need be a member of the board. The board may also appoint one or more assistant treasurers, one or more assistant secretaries, and such other officers and agents as the board may deem advisable, all of whom shall respectively have such authority and perform such duties as from time to time may be prescribed by the board.

Section 2. The officers so elected or appointed shall hold office until their successors are chosen and qualify in their stead. Any officer elected or appointed by the board of directors or by the stockholders, or any member of any committee, may be removed at any time with or without cause by the

Exhibit A-1—(Continued)

affirmative vote of a majority of all of the directors. [36]

Section 3. The president shall be the chief executive officer of the corporation. He shall have general and active management of and exercise general supervision over the business and property of the corporation. He shall execute instruments in writing requiring a seal, in the name, on behalf of and under the seal of the corporation. He shall preside at all meetings of the stockholders and of the board of directors. He shall have such other powers and duties as the board of directors may determine. He shall be ex officio a member of all standing committees.

Section 4. In the event of the death, resignation, retirement, disqualification, disability, sickness, absence, removal from office or refusal to act of the president, a vice president designated by the president or the board of directors shall perform the duties and exercise the powers of the president. The vice presidents shall have such powers and duties as the board of directors may determine.

Section 5. The secretary shall attend all meetings of the stockholders and board of directors and act as secretary of the meeting and record all resolutions and minutes of all proceedings in a book to be kept for that purpose. He shall also, when so requested, act as secretary of any committee appointed by the board. He shall give, or cause to be given, notice of meetings of the stockholders and board of directors, and shall have such other powers and duties as may be prescribed by the board of di-

Exhibit A-1—(Continued)

rectors or by the president, under whose supervision the secretary shall be. The secretary shall keep in safe custody the stock books and the [37] seal of the corporation and, when authorized by the board of directors, or president, shall affix the seal to any instrument requiring the same. The assistant secretaries shall have such powers and perform such duties as may be prescribed by the president, the secretary, or board of directors.

Section 6. The treasurer shall have the custody of the corporate funds and securities, and shall keep full and accurate accounts of receipts and disbursements, in books belonging to the corporation, and shall deposit all moneys and other valuable effects in the name and to the credit of the corporation in such depositaries as may be designated by the board of directors. He shall disburse the funds of the corporation as authorized, taking proper vouchers for such disbursements, and shall render to the president and directors, at the regular meetings of the board or whenever they may require it, an account of all his transactions as treasurer and of the financial condition of the corporation. He shall have such other powers and duties as the president or board of directors may determine. The assistant treasurers shall have such powers and perform such duties as may be prescribed by the president, the treasurer, or the board of directors.

Section 7. The board of directors may by resolution, or the president may, require any officers,

Exhibit A-1—(Continued)

agents, or employees of the corporation to furnish bonds conditioned for the faithful performance of their respective duties, with a surety company satisfactory to the board of directors or president, as surety, the expense of which shall be paid by the corporation. [38]

ARTICLE VIII.

Vacancies

If in any office that may be filled by the board of directors a vacancy shall occur for any reason, or the office of any director shall become vacant, then and in that event the board of directors, or a majority of the remaining directors, may elect or appoint a successor or successors who shall hold office until the next annual election, unless sooner displaced. Any vacancy in the board of directors shall be filled by a director of like qualifications as to director representation as those of his predecessor.

ARTICLE IX.

Duties of Officers and Agents May
Be Delegated

In the event of death, resignation, retirement, disqualification, disability, sickness, absence, removal from office or refusal to act of any officer or agent of the corporation, or for any reason that the board of directors may deem sufficient, the board of directors may delegate for the time being the powers or duties of such officer or agent to any other officer or agent or to any director.

Exhibit A-1—(Continued)

ARTICLE X.

Certificates of Stock

The certificates of stock of the corporation shall be numbered and shall be entered in the books of the corporation as they are issued. They shall exhibit the holder's name and the number of shares and shall be signed by the president or a vice presi- [39] dent and the secretary or an assistant secretary, or treasurer or an assistant treasurer, and shall bear the corporate seal. They shall be in such form and contain such provisions as the board of directors may determine.

ARTICLE XI.

Transfer of Stock

Section 1. Transfer of stock shall be made on the books of the corporation only by the person named in the certificate or by attorney, lawfully constituted in writing, and upon surrender of such certificate.

Section 2. The board of directors may close the stock transfer books in its discretion for a period not exceeding twenty (20) days preceding any meeting, annual or special, of the stockholders.

Section 3. The corporation shall be entitled to treat the holder of record of any share or shares of stock as the holder in fact thereof and accordingly shall not be bound to recognize any equitable or other claim to or interest in such share or shares on the part of any other person whether or not it shall have express or other notice thereof, save as

Exhibit A-1—(Continued)

expressly provided by the laws of the State of Delaware.

Section 4. The board of directors may appoint one or more transfer agents and registrars of transfer, and may require all stock certificates to bear the respective signatures of such respective transfer agents and registrars. [40]

ARTICLE XII.

Lost Certificates

Any person claiming a certificate of stock to be lost or destroyed shall make an affidavit or affirmation of that fact, and advertise the same in such manner as the board of directors may require, and shall give the corporation a bond of indemnity in form and with one or more sureties satisfactory to the board of directors, in at least double the value of the stock represented by said certificate, whereupon a new certificate may be issued of the same tenor and for the same number of shares as the one alleged to be lost or destroyed, but always subject to the approval of the board of directors.

ARTICLE XIII.

Inspection of Books

The accounts and books of the corporation shall be open to the inspection of the stockholders during business hours.

Exhibit A-1—(Continued)

ARTICLE XIV.

Checks, Contracts, Etc.

Section 1. All checks, notes, drafts, acceptances, bills of exchange, orders for the payment of money, and all written contracts and instruments of every kind that do not require a seal shall be signed by such officer or officers or person or persons as the board of directors may from time to time by resolution prescribe.

Section 2. All instruments in writing that require the corporate seal of the corporation to be [41] affixed thereto, shall be signed and attested by such officer or officers as the board of directors may from time to time by resolution prescribe.

ARTICLE XV.

Fiscal Year

The fiscal year shall begin on the first day of January of each year.

ARTICLE XVI.

Section 1. Whenever under the provisions of these by-laws notice is required to be given to any stockholder, director or officer, it shall not be construed to mean personal notice, but such notice may be given by telephone, or, in writing, by letter, telegraph, radio, wireless, or cable, addressed to such stockholder, director or officer at such address as appears on the books of the corporation, or in default of such address to said stockholder, director or officer at his last known post-office ad-

Exhibit A-1—(Continued)

dress, and such notice shall be deemed to be given at the time when the same shall be thus sent or mailed.

Section 2. Any stockholder or director may waive any notice required to be given under the provisions of the General Corporation Law of the State of Delaware, the certificate of incorporation or these by-laws, whether before or after the time stated therein, and his presence at any meeting shall be deemed to be a waiver of notice of such meeting. [42]

ARTICLE XVII.

Amendments

These by-laws, or any of them, may be amended, altered, changed, added to or repealed by the board of directors at any regular or special meeting, provided that not less than a majority of the whole number of directors vote in the affirmative; provided, however, that no amendment of these by-laws shall be made by the board of directors in respect to matters set forth in Section 2 of Article V. [43]

by pledged, together with any that may be pledged hereafter or may have been pledged heretofore as security for this or any other obligation of the Railroad Company to the payee, shall be applicable in like manner to secure the payment of any and all such obligations. And all such securities in the hands of the payee shall stand as one general continuing collateral security for the whole of said obligations so that the deficiency on any one may be made good by enforcement of the rights and remedies of the payee in respect of the sale of collateral or otherwise as to the rest. And the Railroad Company hereby gives to the payee a lien for the amount of all the liabilities aforesaid upon all other property of the Railroad Company at any time coming into the possession of the payee. And the Railroad Company hereby agrees to remain responsible for any deficiency in payment, waiving any benefit, exemption, or privilege under any law now or hereafter to be in force.

The Railroad Company further agrees that on the nonperformance of the foregoing agreement to furnish additional security upon demand of the payee and/or upon nonperformance of any of the covenants or agreements made with the payee, as hereinafter defined, or upon the nonpayment of any of the above mentioned liabilities, or upon default in payment of interest on any of the said liabilities as the same may become due, or in case of insolvency or the appointment of a receiver for the Railroad Company or of its property, or assignment for the benefit of creditors, then in any such case the payee

is hereby authorized to sell, assign, transfer, and deliver any or all of said securities or interest therein or any substitute therefor, or any additions thereto, or any such other property, at such time or times, to such person or persons, and in such several parts or parcels as the payee may decide, and to sell the whole or any of such parts or parcels or interest therein, either at any broker's board or at public or private sale, either for cash, upon credit, or for future delivery, at the option of the payee, without demand, advertisement, or notice of the time or place of sale or adjournments thereof which are hereby expressly waived. Upon the nonpayment or the nonfulfillment of any of the conditions of this note, or upon any sale of any of the collateral security held by the payee or upon the appointment of a receiver of the Railroad Company or of its property or upon an assignment for the benefit of creditors as aforesaid, then the whole or any designated part of the liabilities of the Railroad Company to the payee shall mature at the election of the payee by presentation thereof for payment.

In case of any sale by the payee in pursuance of the terms of the last preceding paragraph of any or all of said securities or interest therein or other property on credit or for future delivery, the payee shall incur no liability in case of failure by the purchaser to take up and pay for such securities or such interest or such other property so sold. In case of any such failure the payee shall have the same right to dispose of said securities and interest

therein and such other property as are given in the last preceding paragraph to the same effect as though no sale had theretofore been made.

At any sale under the provisions of this instrument, the payee may itself purchase the whole or any part of the securities sold or interest therein or other property, free from all right of redemption on the part of the Railroad Company, which right is hereby waived and released. In case of any sale the payee may first deduct all expenses incident to the collection, sale, and delivery of the securities or property so sold, and any other expenses incurred by the payee in connection with such sale; and may then apply the residue to any one, or more, or all, of said liabilities, whether due or not due, returning the overplus, if any, to the Railroad Company, which shall remain liable to the payee for any deficiency remaining or existing after such sale. And the Railroad Company hereby further authorizes the payee, at its option, at any time, to appropriate and apply to the payment of any of the aforesaid liabilities, whether now existing or hereafter contracted, any and all property now or hereafter in the hands of the payee belonging to the Railroad Company, whether the aforesaid liabilities are then due or not due.

The Railroad Company further agrees that, upon any transfer of this note, the payee may deliver the securities or property held as security, or any part thereof, or interest therein, to the transferee, who shall thereupon become vested with all the powers and rights above given to the payee in re-

spect thereto for the purpose of securing and enforcing the payment to the holder of the whole or any part of the indebtedness evidenced by this note. And the payee shall thereafter be forever relieved and fully discharged from any liability or responsibility in the matter to the Railroad Company or to its successors or assigns.

The Railroad Company and indorsers and guarantors hereby waive presentment, protest, and notice of dishonor, and agree to remain bound for the payment of this note and all interest and charges thereon, and that the lien hereof and the pledge hereunder shall remain undisturbed, notwithstanding any extension of time, substitution of collateral, or other indulgence granted by the holder of this note, hereby waiving all notice of such extension, substitution, or other indulgence.

In the event this note, or any part thereof, is collected by an attorney, either with or without suit, the Railroad Company agrees to pay a reasonable attorney's fee and cost of collection.

The term payee shall mean and include The Railroad Credit Corporation and/or any successor, or assign, or liquidator, or transferee of The Railroad Credit Corporation or any other transferee of this note.

Until this note and interest thereon have been fully paid, the Railroad Company agrees not to pay any dividend on any of its capital stock (except on stock, if any, on which non-payment of a specific dividend constitutes a default).

In Witness Whereof the Railroad Company has caused this note to be executed by its Vice President and attested or countersigned by its Assistant Secretary, both being thereunto duly authorized, this 29th day of June, 1932.

Attest:

[Signed]

T. J. BYRNE

Assistant Secretary.

THE WESTERN PACIFIC
RAILROAD COMPANY

[Signed] By M. J. CURRY

Vice President.

Countersigned by:

.....
Title.....

Approved as to form and execution

[Signed]

D. WILLARD, JR.

Counsel 6/29/32

July 15, 1933—Paid on Account of Principal

		Distribution No. 1	\$ 7,353.01
Aug. 15, 1933—	“ “	2	1,838.25
Oct. 16, 1933—	“ “	3	3,676.50
Oct. 16, 1933—	“ “	3 Sac. Nor.	481.33
Dec. 15, 1933—	“ “	Tax Refund	3,114.11
Dec. 30, 1933—	“ “	4 Sac. Nor.	722.00
Dec. 30, 1933—	“ “	4 W. Pac.	5,514.76
Jan. 31, 1934—	“ “	5 Sac. Nor.	192.53
Jan. 31, 1934—	“ “	5 W. Pac.	1,551.97
Mar. 5, 1934—	“ “	3, 4 & 5 Dep. Creek	11.32
May 7, 1934—	“ “	Tax Refunds	3,114.11
June 30, 1934—	“ “	8 W. Pac.	4,864.12
		Sac. Nor.	612.59
		Dp. Creek	5.66

July 31, 1934—Paid on Account of Principal				
		Distribution No. 9 W. Pac.	1,786.20	
		Sac. Nor.	231.91	
		Dp. Creek	1.89	
Sept. 30, 1934—	“	“ 10 W. Pac.	1,786.20	
		Sac. Nor.	231.91	
		Dp. Creek	1.89	
Oct. 31, 1934—	“	“ 11 W. Pac.	1,786.20	
		Sac. Nor.	231.91	
		Dp. Creek	1.89	
Nov. 30, 1934—	“	“ 12 W. Pac.	3,572.40	
		Sac. Nor.	463.82	
		Dp. Creek	3.77	
Dec. 31, 1934—	“	“ 13 W. Pac.	1,786.20	
		Sac. Nor.	231.91	
		Dp. Creek	1.89	
Jan. 31, 1935—	“	“ 14 W. Pac.	1,786.20	
		Sac. Nor.	231.91	
		Dp. Creek	1.89	
Feb. 20, 1935—	“	“ Tax Refunds	1,306.35	
Mar. 31, 1935—	“	“ 15 W. Pac.	1,442.09	
		Sac. Nor.	187.62	
		Dp. Creek	1.89	
Apr. 30, 1935—	“	“ 16 W. Pac.	1,774.73	
		Sac. Nor.	230.44	
		Dp. Creek	1.89	
May 24, 1935—	“	“ Std. Realty & Dev. Co. interest	1,331.50	
May 31, 1935—	“	“ 17 W. Pac.	1,774.73	
		Sac. Nor.	230.44	
		Dp. Creek	1.89	
June 30, 1935—	“	“ 18 W. Pac.	1,774.73	
		Sac. Nor.	230.44	
		Dp. Creek	1.89	
July 31, 1935—	“	“ 19 W. Pac.	1,774.73	
		Sac. Nor.	230.44	
		Dp. Creek	1.89	
Aug. 31, 1935—	“	“ 20 W. Pac.	1,774.73	
		Sac. Nor.	230.44	
		Dp. Creek	1.89	

EXHIBIT A-3

R.C.C. No. 5 6-16-32.

NOTE OF BORROWING CARRIER

New York, N. Y.,
March 25th, 1933.

\$1,293,439.00

On demand, but if no demand is made, then on or before March 24th, 1935, The Western Pacific Railroad Company, a corporation of the State of California (hereinafter called the "Railroad Company"), for value received, promises to pay to The Railroad Credit Corporation (hereinafter called the "payee"), or order, at its office in Washington, D. C., in gold coin of the United States of America of the present standard of weight and fineness, One Million two hundred ninety-three thousand four hundred thirty-nine Dollars, with interest thereon payable semi-annually at the rate of $3\frac{1}{2}$ per cent per annum from the date thereof, to and including the 31st day of March, 1933, and thereafter at rates to be fixed as provided in the Marshalling and Distributing Plan, 1931, and until payment of said principal sum, with the option on the part of the Railroad Company to repay the whole or any part of said principal sum, with accrued interest thereon, at any time before maturity; having deposited with the payee as collateral security for the payment of this note and any extension or renewal thereof, as well as for the payment of any other liability or liabilities of the Railroad Company to the payee due or to become due, or which may hereafter be

contracted or existing, the following described property:

\$2,000,000, principal amount of The Western Pacific Railroad Company's General and Refunding Mortgage Gold Bonds, Series B. In addition thereto, The Railroad Company has caused The Western Pacific Railroad Corporation to pledge with and assign to The Railroad Credit Corporation, as further security for this note and upon the terms and conditions set forth in that certain instrument of pledge bearing even date herewith and executed by said The Western Pacific Railroad Corporation, any and all claim or claims which said The Western Pacific Railroad Corporation has or may have against:

(1) The Western Pacific Railroad Company in the sum of \$5,494,722.00 for advances to said The Western Pacific Railroad Company;

(2) The Standard Realty and Development Company in the sum of \$120,000.00, for advances to said The Standard Realty and Development Company;

(3) Sacramento Northern Railway and/or The Western Pacific Railroad Company in the sum of \$856,260.00 for advances shown on the books of the Railroad Corporation as indebtedness of Sacramento Northern Railway, subject to any and all rights and claims, if any, of the trustees or the holders of any of the bonds issued under the First Mortgage dated June 26, 1916, executed by The Western Pacific Railroad Company to the First Federal Trust Company (now Crocker First Federal Trust Company) and Henry E. Cooper, as

trustees, including, without limiting the generality of the above proviso, the lien, if any, of said First Mortgage upon said claim or claims and also the obligation, if any, of The Western Pacific Railroad Company or of the Railroad Corporation pursuant to the terms and provisions of said First Mortgage to cause said claim or claims to be discharged or to pledge the same under said First Mortgage.

Further in addition thereto the A. C. James Co., at the request of the Railroad Company has deposited and pledged with The Railroad Credit Corporation, \$2,000,000. principal amount of The West- to the provisions of a receipt therefor this day given to the A. C. James Co. by The Railroad Credit Corporation, \$2,000,000. principal amount of The Western Pacific Railroad Company's General and Refunding Mortgage Gold Bonds, Series A, evidenced by temporary certificate numbered T-5.

1933

Sept. 26 Paid on Account of Interest....\$19,796.80

Oct. 27 Paid on Account of Interest
to Sept. 25, 1933 215.58

1934

Apr. 30 Paid on Account of Interest.... 12,031.16 7th dis. W.P.
32,043.54

, and subject to the authorization of the Interstate Commerce Commission when and to the extent required by the law,

In addition thereto, the Railroad Company agrees to pledge and does hereby pledge with the payee, the Railroad Company's distributive share in the fund established under the aforesaid Plan, as the same may be at any time and from time to time deter-

nined, and also all right, title and interest of the Railroad Company in and to any and all securities now or hereafter deposited as collateral security for any loan or loans from the Reconstruction Finance Corporation to the Railroad Company, subject always to the lien thereon of said Reconstruction Finance Corporation.

The Railroad Company hereby agrees, on demand of the payee, to deposit with the payee such additional security as the payee may from time to time demand, and further agrees that the securities hereby pledged, together with any that may be pledged hereafter or may have been pledged heretofore as security for this or any other obligation of the Railroad Company to the payee, shall be applicable in like manner to secure the payment of any and all such obligations. And all such securities in the hands of the payee shall stand as one general continuing collateral security for the whole of said obligations so that the deficiency on any one may be made good by enforcement of the rights and remedies of the payee in respect of the sale of collateral or otherwise as to the rest. And the Railroad Company hereby gives to the payee a lien for the amount of all the liabilities aforesaid upon all other property of the Railroad Company at any time coming into the possession of the payee. And the Railroad Company hereby agrees to remain responsible for any deficiency in payment, waiving any benefit, exemption, or privilege under any law now or hereafter to be in force.

The Railroad Company further agrees that on the nonperformance of the foregoing agreement to furnish additional security upon demand of the payee and/or upon nonperformance of any of the covenants or agreements made with the payee, as hereinafter defined, or upon the nonpayment of any of the above mentioned liabilities, or upon default in payment of interest on any of the said liabilities as the same may become due, or in case of insolvency or the appointment of a receiver for the Railroad Company or of its property, or assignment for the benefit of creditors, then in any such case the payee is hereby authorized to sell, assign, transfer, and deliver any or all of said securities or interest therein or any substitute therefor, or any additions thereto, or any such other property, at such time or times, to such person or persons, and in such several parts or parcels as the payee may decide, and to sell the whole or any of such parts or parcels or interest therein, either at any broker's board or at public or private sale, either for cash, upon credit, or for future delivery, at the option of the payee, without demand, advertisement, or notice of the time or place of sale or adjournments thereof which are hereby expressly waived. Upon the nonpayment or the nonfulfillment of any of the conditions of this note, or upon any sale of any of the collateral security held by the payee or upon the appointment of a receiver of the Railroad Company or of its property or upon an assignment for the benefit of creditors as aforesaid, then the whole or any designated part of the

liabilities of the Railroad Company to the payee shall mature at the election of the payee by presentation thereof for payment.

In case of any sale by the payee in pursuance of the terms of the last preceding paragraph of any or all of said securities or interest therein or other property on credit or for future delivery, the payee shall incur no liability in case of failure by the purchaser to take up and pay for such securities or such interest or such other property so sold. In case of any such failure the payee shall have the same right to dispose of said securities and interest therein and such other property as are given in the last preceding paragraph to the same effect as though no sale had theretofore been made.

At any sale under the provisions of this instrument, the payee may itself purchase the whole or any part of the securities sold or interest therein or other property, free from all right of redemption on the part of the Railroad Company, which right is hereby waived and released. In case of any sale the payee may first deduct all expenses incident to the collection, sale, and delivery of the securities or property so sold, and any other expenses incurred by the payee in connection with such sale; and may then apply the residue to any one, or more, or all, of said liabilities, whether due or not due, returning the overplus, if any, to the Railroad Company, which shall remain liable to the payee for any deficiency remaining or existing after such sale. And the Railroad Company hereby further authorizes the payee, at its option,

at any time, to appropriate and apply to the payment of any of the aforesaid liabilities, whether now existing or hereafter contracted, any and all property now or hereafter in the hands of the payee belonging to the Railroad Company, whether the aforesaid liabilities are then due or not due.

The Railroad Company further agrees that, upon any transfer of this note, the payee may deliver the securities or property held as security, or any part thereof, or interest therein, to the transferee, who shall thereupon become vested with all the powers and rights above given to the payee in respect thereto for the purpose of securing and enforcing the payment to the holder of the whole or any part of the indebtedness evidenced by this note. And the payee shall thereafter be forever relieved and fully discharged from any liability or responsibility in the matter to the Railroad Company or to its successors or assigns.

The Railroad Company and indorsers and guarantors hereby waive presentment, protest, and notice of dishonor, and agree to remain bound for the payment of this note and all interest and charges thereon, and that the lien hereof and the pledge hereunder shall remain undisturbed, notwithstanding any extension of time, substitution of collateral, or other indulgence granted by the holder of this note, hereby waiving all notice of such extension, substitution, or other indulgence.

In the event this note, or any part thereof, is collected by an attorney, either with or without

suit, the Railroad Company agrees to pay a reasonable attorney's fee and cost of collection.

The term payee shall mean and include The Railroad Credit Corporation and/or any successor, or assign, or liquidator, or transferee of The Railroad Credit Corporation or any other transferee of this note.

Until this note and interest thereon have been fully paid, the Railroad Company agrees not to pay any dividend on any of its capital stock (except on stock, if any, on which non-payment of a specific dividend constitutes a default).

In Witness Whereof the Railroad Company has caused this note to be executed by its Vice President and attested or countersigned by its Assistant Secretary, both being thereunto duly authorized, this 25th day of March, 1933.

THE WESTERN PACIFIC
RAILROAD COMPANY

By M. CURRY
Vice President.

Attest:

[Seal] T. J BYRNE
Assistant Secretary.

Countersigned by:

.....
Title
D. WILLIARD, JR.
5/25/37

EXHIBIT A-4

The Railroad Credit Corporation
804 Transportation Building
Washington, D. C.

Telephone National 1360

July 3, 1934 r

E. G. Buckland, President
E. R. Woodson, Vice President
A. B. Chapin, Treasurer
W. J. Kane, Secretary
Daniel Willard, Jr., Counsel

The Western Pacific Railroad Company,
37 Wall Street,
New York City.

Dear Sirs:

We refer to the letter written to you by the Reconstruction Finance Corporation dated June 23, 1934, and signed by the Chairman of such Corporation.

Subject to your obtaining from the holders of at least 75% of your outstanding First Mortgage Bonds, assents to the agreement of extension, dated as of March, 1, 1934, as modified by the additional conditions contained in the printed letter of The Western Pacific Railroad Company dated May 29, 1934 (omitting the condition that the Reconstruction Finance Corporation, The Railroad Credit Corporation, A. C. James Co. and The Western Pacific Railroad Corporation shall in writing unconditionally consent and agree as provided in par-

agraph 2 contained in said printed letter and substituting therefor that the Reconstruction Finance Corporation, The Railroad Credit Corporation, A. C. James Co. and The Western Pacific Railroad Corporation shall agree as herein set forth) and subject to your obtaining from the A. C. James Co., the Reconstruction Finance Corporation, and The Western Pacific Railroad Corporation an agreement with respect to their respective loans to your Company similar to the agreement herein contained (with like exception with respect to collateral held by them respectively), this Corporation agrees, in the circumstances, that it will not, prior to January 1, 1937 or should prior to such date receivers be appointed for the Railroad Company or the filing of a petition by or against it be allowed by the Court under Section 77 of the Federal Bankruptcy Act, as amended, [51] then prior to the appointment of such receivers or the allowance of the filing of such petition, whichever may be earlier, take any action with respect to collecting interest falling due during the calendar year 1934 on loans of this Corporation to the Railroad Company, and further agrees that, until such time as the 1934 extended interest on the First Mortgage Bonds shall be paid in full, the 1934 extended interest on such assenting First Mortgage Bonds shall be entitled to priority of payment over interest and principal of loans of this Corporation to the Railroad Company (except with respect to assets or the income therefrom on which any mortgage securing bonds comprised in the collateral pledged as secur-

ity for loans of this Corporation is a lien prior to the lien of said First Mortgage and except the collateral for such loans or the proceeds thereof or any payments which may be received by this Corporation therefrom or be realized by it out of the same and except the right of this Corporation to retain sums payable under the Marshalling and Distributing Plan, 1931) in any proceedings commenced prior to July 1, 1937, whether taken by this Corporation to enforce payment of interest or principal of such loans or otherwise.

Yours very truly,

THE RAILROAD CREDIT
CORPORATION

By (s) E. R. WOODSON
Vice President

[Endorsed]: Filed Sep. 12, 1935. [52]

Supreme Court of the United States

File No. 26591

Nos. 7, 8, 20, 33 & 61

October Term, 1942.

In the Matter of The Western

WESTERN PACIFIC RAILROAD COMPANY,
Debtor.

MANDATE

United States of America—ss.

The President of the United States of America,
To the Honorable the Judges of the District Court
of the United States for the Northern District
of California,

[Seal]

Greeting:

Whereas, lately in the United States Circuit Court of Appeals for the Ninth Circuit, in a cause between Western Pacific Railroad Corporation, The Western Pacific Railroad Company, Irving Trust Company, as Substituted Trustee Under the General and Refunding Mortgage of Western Pacific Railroad Company, et al., Appellants, and Institutional Bondholders Committee, Reconstruction Finance Corporation, Crocker First National Bank of San Francisco and Samuel Armstrong, Trustees of the First Mortgage of the Western Pacific Railroad Company. Appellees. No. 9714, wherein the judgment of the said Circuit Court of Appeals, entered in said cause on the 28th day of November,

A. D. 1941, as amended by order of February 12, 1942, is in the following words, viz:

“This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division, and was duly submitted;

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the order of the said District Court in this cause approving a plan of reorganization be and hereby is reversed, with costs in favor of the Appellants and against the appellees and that this cause be, and hereby is remanded to the said District Court with directions to dismiss it or, in the court's discretion and on motion of any party in interest, refer it back to the Commission for further action.

It is further ordered, adjudged, and decreed by this Court, that the appellants recover against the appellees for their costs herein expended, and have execution therefor.” [53]

as by the inspection of the transcript of the record of the said United States Circuit Court of Appeal which was brought into the Supreme Court of the United States by virtue of writs of certiorari granted upon the petitions of Frederick H. Ecker, et al., Constituting the Institutional Bondholders Committee; Crocker First National Bank of San Francisco et al., Trustees, etc.; The Western Pacific Railroad Company. Reconstruction Finance Corporation; and Irving Trust Company, as Substituted Trustee, etc., agreeably to the act of Con-

gress, in such case made and provided, fully and at large appears. [54]

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and forty-two, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said United States Circuit Court of Appeals in this cause be, and the same is hereby, reversed; and that the judgment of the District Court in this cause, be, and the same is hereby, affirmed.

And It Is Further Ordered that costs in this Court be assessed against the losing parties on this review of the action of the District Court. This assessment is without prejudice to a motion for allowance for disbursements by respondents in accordance with Sec. 77 of the Bankruptcy Act, subsection (c) (12).

And It Is Further Ordered, That the prevailing parties here, Frederick H. Ecker, et al., constituting the Institutional Bondholders Committee, Crocker First National Bank of San Francisco and Samuel Armstrong, Trustees of the First Mortgage of the Western Pacific Railroad Company, and the Reconstruction Finance Corporation recover against the said appellants, Western Pacific Railroad Corporation, Western Pacific Railroad Company, Irving Trust Company, as Substituted Trustee, etc., et al., as follows:

Frederick H. Ecker, et al., constituting the Institutional Bondholders Committee—One Hundred Fifty-five Dollars and Sixty-two cents.

Crocker First National Bank of San Francisco and Samuel Armstrong. Trustees of the First Mortgage of the Western Pacific Railroad Company—Seventy-nine Dollars and Eighty Cents.

Reconstruction Finance Corporation—(To be paid by Western Pacific Railroad Corporation, et al., direct to Clerk, Supreme Court.) for their costs herein expended and have execution therefor.

And It Is Further Ordered that this cause be, and the same is hereby, remanded to the District Court of the United States for the Northern District of California.

March 15, 1943. [55]

You, therefore, are hereby commanded that such execution and proceedings be had in said cause, in conformity with the opinion and judgment of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said writ of certiorari notwithstanding.

Witness, the Honorable Harlan F. Stone, Chief Justice of the United States, the sixth day of May, in the year of our Lord one thousand nine hundred and forty-three.

(Signed) CHARLES ELMORE CROPLEY
Clerk of the Supreme Court
of the United States. [56]

Supreme Court of the United States
October Term, 1942

Cost of Crocker First National Bank of San Francisco, et al., in No. 8.

1942, October Term—Docketing cause and filing record \$15.00; appearance, .50; filing praecipe .50; filing papers, \$4.25; filing briefs, \$20.00; submission, .20; order, .20; filing and recording, .65; certified copy of the order, \$5.00; continuance, .25; transfer, \$1.00;
argument, .20; judgment, \$1.00; filing same, .25; recording, .40; mandate, \$10.00; attorney's docket fee, \$20.00; cost and copy, .40; 79.80

\$79.80

Fee Book, Page 46 148

Test:

CHARLES ELMORE CROPLEY
Clerk of the Supreme Court of
the United States.

By
Deputy [57]

Supreme Court of the United States
October Term, 1942

Cost of Frederick H. Ecker, et al., in No. 7.

1942, October Term—Docket cause and
filing record, \$15.00; appearance, .50; fil-
ing praecipe .50; filing papers, \$14.25; fil-
ing briefs, \$50; submission, .80; order, .20;
filing and recording, .65; certified copy of
the order, \$5.00; continuance .25; transfer,
\$1.00;

argument .20; judgment, \$1.00; filing
same, .25; recording, .40; mandate \$10.00
preparing record for printer, etc., .80;
cost of printing record \$34.42; attorney's
docket fee, \$20.00; costs and copy, .40;... 155.62

\$ 155.62

Fee Book, page 46 147

Test:

CHARLES ELMORE CROPLEY

Clerk of the Supreme Court of
the United States.

H. W. BARR

Hugh W. Barr

Deputy.

[Endorsed]: Filed May 13, 1943. [58]

[Title of District Court and Cause.]

No. 26591-S

PETITION OF REORGANIZATON COMMT-
TEE FOR AN ORDER CONSTRUING
PLAN OF REORGANIZATION IN VARI-
OUS RESPECTS AND RECONCILNG IN-
CONSISTENCIES THEREIN

Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, being all the members of the Reorganization Committee designated to put into effect and carry out the plan of reorganization of the debtor above named, hereby represent to the Court and petition as follows:

1. Subdivision V of the plan of reorganization of the debtor above named (hereinafter called "the plan") provides: [59]

"V. The construction of the plan by the court shall be final and conclusive. The court may cure any defect, supply any omission, or reconcile any inconsistency in such manner or to such extent as may be necessary or expedient in order to carry out the plan effectively."
(223 I.C.C. Rep. 455)

2. In order to expedite the work of your petitioners in carrying out the plan and consummating the reorganization, it is necessary that petitioners be advised by the Court as to the proper construction of certain provisions of the plan hereinafter mentioned and the manner of curing the defects and reconciling the inconsistencies hereinafter pointed out. The petitioners will then be able to

Court, the form and provisions of mortgages, bonds, coupons and other instruments which are necessary or desirable in connection with carrying out the plan.

I.

3. In its report of June 21, 1939, the Interstate Commerce Commission states as to the allotment of new securities to First Mortgage bondholders:

“Based upon our conclusion as to the relative priority, value, and equity of the various claims and the value of the new securities available in exchange therefor, we find that the new securities should be allotted as follows: (1) First-mortgage bondholders, \$19,716,040 of income-mortgage bonds, \$29,574,060 of preferred stock, and 230,593 shares of common stock, the common stock to be taken at the price of \$57 a share; * * *” (233 I.C.C. Rep. 417)

Paragraph 2 of subdivision P of the plan provides:

“2. Holders of existing first-mortgage bonds shall receive for each \$1,000, principal amount thereof, together with \$266.66 $\frac{2}{3}$ of interest accrued and unpaid thereon to January 1, 1939, approximately \$400 of income-mortgage $4\frac{1}{2}$ -percent bonds, series A, being 40 percent of the principal amount of said existing bonds; \$600 of 5-percent preferred stock, series A, being 60 percent of the principal amount of said bonds; and 4.67 shares of [60] common stock, being common stock taken at the price

of \$57 a share for 100 percent of said accrued and unpaid interest." (233 I.C.C. Rep. 451)

The language quoted above presents an inconsistency requiring reconciliation by the Court. The issue of 4.67 shares of common stock at the price of \$57 a share would not equal the exact amount stated of \$266.66 $\frac{2}{3}$ as the accrued and unpaid interest to January 1, 1939 on \$1,000 principal amount of First Mortgage bonds; nor, indeed, would the issue of common stock at the rate of 4.67 shares in respect of the accrued and unpaid interest on each \$1,000 principal amount of existing First Mortgage bonds result in an aggregate issue of 230,593 shares of common stock in respect of the aggregate of accrued and unpaid interest to January 1, 1939 upon all outstanding First Mortgage bonds, said 230,593 shares being the number of common shares allocated to the First Mortgage bonds under the provisions of the Commission's report of June 21, 1939 quoted above, and under subdivision P of the plan as indicated further by subtracting from the total shares authorized to be issued in the reorganization (319,441 shares; see subdivision N of the plan) the aggregate common shares allocated to secured creditors (88,848 shares; see paragraphs 3, 4 and 5 of subdivision P of plan.)

4. Notwithstanding the inconsistencies mentioned in paragraph 3 above, your petitioners, on advice of counsel, propose, subject to the approval of the Court, the issue of 4.67 shares of common stock in respect of all accrued and unpaid interest to January 1, 1939, in the amount of \$266.66 $\frac{2}{3}$ on each \$1,000 principal amount of First Mort-

gage bonds; which will result in an aggregate issue under the plan of 230,184,767 shares of common stock in respect of the aggregate of accrued [61] and unpaid interest to January 1, 1939, upon all First Mortgage bonds.

II.

5. Paragraphs 4 and 5 of subdivision P of the plan provide:

“4. The Railroad Credit Corporation shall receive in respect of its claim in the principal amount of \$2,455,610, together with \$146,503 of interest accrued and unpaid thereon to January 1, 1939, subject to the reduction of said amounts by the application, prior to the date of issue of the new securities under the plan, of any proceeds from the distributive shares of the company or its subsidiaries under the marshalling and distributing plan, 1931, approximately \$154,111 of income-mortgage 4½-percent bonds, series A; \$241,681 of 5-percent preferred stock, series A; and 35,425 shares of common stock, being common stock taken at the price of \$62 per share. The Railroad Credit Corporation's equity in the collateral securing the claim of the Reconstruction Finance Corporation is found to be without value.” (233 I.C.C. Rep. 452)

“5. The A. C. James Company shall receive in respect of its claim in the principal amount of \$4,999,800, together with \$1,249,950 of interest accrued and unpaid thereon to January

1, 1939 \$163,724 of income-mortgage 4½-percent bonds, series A; \$256,756 of 5-percent preferred stock, series A; and 37,635 shares of common stock, being an amount of common stock allotted to the claim of the Railroad Credit Corporation the same proportion that the principal amount of general and refunding mortgage bonds of the debtor held by the A. C. James Company as collateral for said claim, bears to the principal amount of such bonds held by the Railroad Credit Corporation as collateral for its claim.” (233 I.C.C. Rep. 452)

Subdivision R of the plan provides in part:

“* * * All collateral pledged by the debtor as security for notes to the Reconstruction Finance Corporation, the Railroad Credit Corporation, and the A. C. James Company shall be reduced to possession by the respective pledgees thereof, and shall be surrendered by them to the reorganized company and canceled, except that the Railroad Credit Corporation shall not release or surrender any right or interest in the distributive shares of the debtor or its subsidiaries under the marshaling and distributing plan, 1931, but any proceeds from such distributive shares after the effective date [62] of the plan shall become the property of and be retained by the Railroad Credit Corporation, but to the extent to which received prior to the issue of the new securities under the plan shall be applied in reduction of the

claim of the Railroad Credit Corporation in respect of which such new securities are to be issued at the rates provided in subdivision P. * * *'' (233 I.C.C. Rep. 453)

District Judge St. Sure in his opinion approving the plan of reorganization used the following language (In re Western Pac. R. Co., 34 F. Supp. 493, 498):

"RCC and ACJ are allotted new securities on the following basis: From the new securities, which the Commission finds are properly issuable in respect of the refunding mortgage bonds held as collateral for the RFC, RCC, and ACJ notes, are deducted that proportion of each class which the principal amount of refunding mortgage bonds held by RFC as collateral bears to the total amount of pledged refunding mortgage bonds. The balance of such new securities is then divided between RCC and ACJ in proportion to the principal amounts of refunding mortgage bonds held by them respectively as collateral. The result is the allotment of common stock to RCC on its claim at the price of \$62 per share.

"The unsecured claims of the Western Pacific Railroad Corporation and the Western Realty Company, and other unsecured claims not entitled to priority over existing mortgage, are found by the Commission to be without value and not entitled to participate in the distribution of cash or securities of the reorganized company."

6. The Railroad Credit Corporation has received since January 1, 1939, the effective date of the plan, proceeds from the distributive shares of the debtor and its subsidiaries under the marshaling and distributing plan of 1931 in the aggregate total amount of \$26,091.72; and further proceeds from such distributive shares may be received by The Railroad Credit Corporation prior to the issue of the new securities under the plan.

7. The Railroad Credit Corporation has taken the position that while it is required under the plan to (a) reduce the amount of its presently secured claim by the market value [63] of the securities allotted to it under paragraph 4 of subdivision P of the plan, and (b) by any proceeds received by it from the distributive shares of the debtor and its subsidiaries under the marshaling and distributing plan of 1931, and (c) by any proceeds received by it from the other pledged collateral, it is nevertheless entitled to receive and retain all securities allotted to The Railroad Credit Corporation under paragraph 4 of subdivision P of the plan, the balance of said claim being an unsecured claim against the debtor which the Commission in paragraph 6 of subdivision P of the plan has found to be without value.

8. The petitioners, upon advice of counsel, submit to the Court that the position so taken by The Railroad Credit Corporation is inconsistent with the provisions of the plan quoted in paragraph 5 hereinabove, and the petitioners ask the Court for a definitive construction of such quoted language so

that it will be possible for the petitioners to determine with certainty the exact amounts and number of securities to be allocated to The Railroad Credit Corporation upon consummation of the reorganization.

III.

9. The debtor's notes to The Railroad Credit Corporation are secured in part by the pledge and assignment of advances made by The Western Pacific Railroad Corporation to Standard Realty and Development Company and to Sacramento Northern Railway. These advances were pledged with and assigned to The Railroad Credit Corporation by The Western Pacific Railroad Corporation as accommodation collateral and are evidenced by a written instrument dated March 25, 1933. On January 1, 1939, the outstanding balance of the advances to [64] Standard Realty and Development Company so pledged with and assigned to The Railroad Credit Corporation amounted to \$110,000 principal; the outstanding balance of the advances to Sacramento Northern Railway amounted to \$856,260 principal, together with accrued unpaid interest from November 1, 1931.

10. Standard Realty and Development Company is a California corporation, all of the outstanding capital stock of which is now, and at all times mentioned in this petition, has been owned by the debtor. Standard Realty and Development Company is therefore a hundred percent owned subsidiary of Company is also indebted to the debtor for advances

on open account in the amount of \$363,310.86, and upon a demand note in the amount of \$251,273.07.

11. Sacramento Northern Railway is a California corporation, operating a railway connecting San Francisco and Oakland with various Sacramento Valley cities in the State of California. All of the outstanding capital stock of Sacramento Northern Railway is, and at all times mentioned in this petition, has been owned by the debtor. Sacramento Northern Railway is therefore a hundred percent owned subsidiary of the debtor and its railway lines are operated as an integral part of the interstate railway system of the debtor. In addition to its stock ownership, the debtor owns \$5,213,475 principal amount of the First Mortgage bonds of Sacramento Northern Railroad (liability upon which was assumed by Sacramento Northern Railway) being substantially all of the outstanding bonds of Sacramento Northern Railroad. Sacramento Northern Railway is also indebted to the debtor for advances for capital purposes evidenced by notes, in the amount of \$4,524,744.38 principal, and for advances on open [65] account in the amount of \$4,949,356.42 principal.

12. Since January 1, 1939, the effective date of the plan, The Western Pacific Railroad Corporation has received payment from Standard Realty and Development Company of \$42,500.00 principal and \$22,855.97 interest, on account of the advances to Standard Realty and Development Company. Of the sums so received, The Western Pacific Railroad Corporation has paid over to The Railroad Credit

Corporation \$17,500.00 principal and \$20,102.10 interest, said sums having been applied by The Railroad Credit Corporation in reduction of interest upon its note claim against the debtor. Further payments by Standard Realty and Development Company on account of such advances may be made prior to the issue of the new securities under the plan.

13. The Western Pacific Railroad Corporation claims that the securities to be allotted to The Railroad Credit Corporation (the amounts and number enumerated hereinbelow) under the plan constitute payment in full of The Railroad Credit Corporation's claim and that The Western Pacific Railroad Corporation is entitled to have returned to it by The Railroad Credit Corporation the original instrument pledging and assigning the advances made to Standard Realty and Development Company and Sacramento Northern Railway as part of the collateral securing the debtor's notes to The Railroad Credit Corporation. The Railroad Credit Corporation denies these contentions, its position being that the allotment of securities under the plan is predicated solely upon the collateral pledged by the debtor (said collateral consisting of \$4,000,000 of the debtor's General and Refunding Mortgage bonds) the amounts and number of said allotted securities being in proportion to the total amount of said General and Refunding Mortgage bonds outstanding. [66]

14. In its order of June 21, 1939, the Interstate

Commerce Commission refers to and makes a part of said order its supplemental report of the same date, in the following language:

“It further appearing, That the Commission upon reconsideration of the record herein in the light of the aforesaid argument, has, on the date hereof, made and filed its supplemental report containing its findings of fact and conclusions thereon with respect to the modifications of plan requested, and a full statement of the reasons therefor, which report is hereby referred to and made a part hereof:” (233 I.C.C. Rep. 441)

In its conclusions with respect to the allotment of securities, said supplemental report of the Commission states:

“Based upon our conclusion as to the relative priority, value, and equity of the various claims and the value of the new securities available in exchange therefor, we find that the new securities should be allotted as follows: (1) First-mortgage bondholders, \$19,716,040 of income-mortgage bonds, \$29,574,060 of preferred stock, and 230,593 shares of common stock, the common stock to be taken at the price of \$57 a share; (2) Finance Corporation, \$1,185,200 of income-mortgage bonds, \$1,777,800 of preferred stock, and 15,788 shares of common stock, the common stock to be taken at a price of \$57 a share; (3) Credit Corporation, \$154,111 of income-mortgage bonds, \$241,681 of

preferred stock, and 35,425 shares of common stock, the common stock to be taken at a price of \$62 a share, and (4) James Company, \$163,724 of income-mortgage bonds, \$256,756 of preferred stock, and 37,635 shares of common stock, being the amount of common stock which bears to the amount of common stock allotted to the claim of the Credit Corporation the same proportion that the principal amount of general and refunding bonds of the debtor held by the James Company as collateral for its claim bears to the principal amount of such bonds held by the Credit Corporation for its claim. We will modify our prior report and order accordingly." (233 I.C.C. Rep. 417)

In referring to that part of the bondholders committee's modified plan, which suggested that the modified plan provide that:

"* * * All collateral pledged by others than the debtor as security for the debtor's notes to the Finance Corporation, Credit Corporation, and James Company, would be surrendered to the pledgors thereof, and all collateral pledged by the debtor [67] as security for such notes would be reduced to possession by the respective pledges thereof, and would then be surrendered by them to the reorganized company and canceled, except that the Credit Corporation would not release or surrender any right or interest in the distributive shares of the debtor or its subsidiaries under the marshaling and

distributing plan, 1931, but any proceeds from such distributive shares after the effective date of the plan, would become the property of and be retained by the Credit Corporation, but to the extent to which received prior to the issue of the new securities under the plan would be applied in reduction of the claim of the Credit Corporation.” (233 I.C.C. Rep. 431, 432)

the Commission stated in its conclusion:

“We do not approve that part of the foregoing provisions which states that all collateral pledged by others than the debtor as security for the debtor’s notes to the Finance Corporation, Credit corporation, and James Company would be surrendered to the pledgors thereof. With this provision eliminated we approve the foregoing provisions. * * *” (233 I.C.C. Rep. 432)

15. The Supreme Court of the United States sustained the provision of Paragraph R of the Commission’s order of June 21, 1939 (hereinabove quoted) which directed the surrender and cancellation of collateral pledged by the debtor, but held that the Commission acted properly in refusing to direct the surrender of collateral pledged by others than the debtor. The opinion states with reference to such collateral:

“* * * None of the collateral, other than the refunding bonds, was a claim against the debtor. A. C. James Company and the Western Pacific Corporation perhaps had unsecured

claims against the debtor for their securities and other collateral which the debtor had borrowed but these were held worthless as claims against the debtor. 233 I.C.C. 452. This collateral, other than the refunding bonds, was therefore left with the pledges with its position unaffected by any direct action of the Commission.

“* * * Of course the collateral loaned to the debtor which was not an obligation of the debtor could not be ordered by the plan to be canceled. It remained with the pledgees. This ‘collateral pledged by the debtor’ was properly to be reduced to possession by the pledgees, surrendered and canceled. * * * The A. C. James Company unsecured [68] claim against the debtor for the loan of the bonds is valueless, 233 I.C.C. 452, and the plan does not deal with any possible claim of accommodation pledgors against pledgees of bonds which were not the property of the debtor.” (318 U.S. 448, 505, 506)

For the convenience of the Court there is appended hereto as Exhibit A that part of the opinion of the Supreme Court which deals with accommodation collateral.

16. The plan of reorganization contains no provision that payments received by The Railroad Credit Corporation after the effective date of the plan on account of the advances pledged with it by The Western Pacific Railroad Corporation, shall

be applied in reduction of the claim of The Railroad Credit Corporation or in reduction of the new securities allocated to The Railroad Credit Corporation under the plan, except in so far as such reduction in claim may be implied from the treatment accorded in the plan to similar payments received by The Railroad Credit Corporation under the marshaling and distributing plan of 1931 (see paragraph 5 above). The Railroad Credit Corporation has taken the position that it is entitled to retain all sums received by it after the effective date of the plan on account of such advances without incurring or suffering any reduction in the number or amounts of securities allocated to The Railroad Credit Corporation under paragraph 4 of subdivision P of the plan.

17. Standard Realty and Development Company and Sacramento Northern Railway are each subsidiaries of the debtor and essential elements in the debtor's railway system. In view of the substantial conflicting claims against these two subsidiaries of the debtor asserted by The Railroad Credit Corporation and The Western Pacific Railroad Corporation, your petitioners [69] submit that the Court should in this proceeding determine (a) the extent of the lien of The Railroad Credit Corporation upon these claims against such subsidiaries, (b) the extent to which payments heretofore received by Railroad Credit Corporation on account of such claims, after the effective date of the plan, may be retained by it, (c) the extent to which payments made to The Western Pacific Railroad Corporation

on account of such claims, after the effective date of the plan, but not paid over to Railroad Credit Corporation are rightfully due to Railroad Credit Corporation, and (d) whether any reduction should be made in the number and amounts of securities allocated to Railroad Credit Corporation under paragraph 4 of subdivision P of the plan by reason of such lien or payments.

IV.

18. In providing for the determination of available net income for each calendar year, subdivision L of the plan provides in part:

“L. Available net income shall be determined for each calendar year beginning with the year 1939, and continuing thereafter so long as any income-mortgage bonds remain outstanding. When no income-mortgage bonds remain outstanding, the provisions of this subdivision L shall cease to be operative.

“Available net income for each such calendar year shall be determined by deducting all fixed charges of the reorganized company and its wholly owned railway subsidiaries accrued during such calendar year from the consolidated income of the reorganized company and its wholly owned railway subsidiaries available for fixed charges for such calendar year, determined in accordance with the accounting rules of this Commission or other analogous Federal authority having jurisdiction in the premises at the time in force, or, to the extent not gov-

erned by such accounting rules, in accordance with sound accounting practice; provided, however, that if the reorganized company shall not come into ownership and possession of the properties now operated by the bankruptcy trustees on or before January 1, 1939, available net income for any period [70] after January 1, 1939, until the reorganized company comes into ownership and possession of such properties shall be computed as if the reorganized company had come into such ownership and possession on January 1, 1939, and had issued, as of that date, the new securities issuable under the plan, other than the \$10,000,000 of new first-mortgage bonds, series A, and in lieu of interest on such bonds there shall be charged the amount of interest actually accruing during such period upon any then outstanding trustees' certificates or other obligations issued to provide funds for rehabilitation purposes.

“Available net income shall be ascertained for each such calendar year as the accounts shall be stated on the books of the reorganized company during such calendar year, without adjustments, except * * * (3) debits or credits to adjust income in prior years shall be treated as income items for the year in which entered on the books, whether cleared through income or profit and loss accounts, so far, but only so far, as such debits and credits reflect cash receipts or disbursements in the year in which

they are entered on the books.” (233 I.C.C. Rep. 447) (Emphasis supplied)

19. While the second paragraph of subdivision L quoted above requires the inclusion of the income and fixed charges of “wholly owned railway subsidiaries” of the debtor and of the reorganized company in the determination of available net income for each calendar year beginning with the year 1939, it does not require the inclusion in such determination of the income and fixed charges of any railway subsidiaries of the debtor or of the reorganized company other than “wholly owned railway subsidiaries”. The debtor corporation now owns, and at all times since December 31, 1938 has owned, \$1,147,968 par value of the outstanding capital stock of Tidewater Southern Railway Company being approximately 97.97% of the total amount of stock outstanding; Standard Realty and Development Company, wholly owned subsidiary of the debtor, has acquired from the public since the commencement of the proceedings for the reorganization of the [71] debtor, and now owns, \$15,069 par value of said capital stock; and \$8,769 thereof is now owned by the public. It appears, however, from the reports of the Commission in this matter that the Commission intended that the income and fixed charges of Tidewater Southern Railway Company should be included in the determination of available net income of the reorganized company. Both in its report dated October 10, 1938 and in its report dated June 21, 1939 in this proceeding the Commission discussed the reported consolidated net

income of the debtor's system available for interest, and estimates of such consolidated income for future years and determined the capitalization authorized in the plan in relation to such data. In fact, the reported consolidated net income of the debtor's system and estimates of such income for future years included the income of its wholly owned railway subsidiaries and the income of Tidewater Southern Railway Company.

20. Petitioners submit to the Court that the requirements of the second paragraph of subdivision L of the plan, that the income and fixed charges of only the "wholly owned railway subsidiaries" of the debtor and of the reorganized company shall be included in the determination of available net income for any year presents a defect and inconsistency in the plan which should be cured and reconciled by the Court, and to this end that the Court should interpret the term "wholly owned railway subsidiaries" of the debtor as including Tidewater Southern Railway Company, and "wholly owned railway subsidiaries" of the reorganized company as including any railway corporation substantially all (i.e., 95% or more) of the stock of which shall be owned by the reorganized company. [72]

21. The accounts of the debtor company have been and necessarily will continue to be kept on an accrual basis; and it has been and will be necessary to make in every year adjustments of accounting performed in prior years and to include in the accounts for each year final entries in respect of

items previously set up as estimates or against contingencies. The failure to treat as income items all such adjustments, whether debits or credits, except such as reflect cash receipts or disbursements in the year in which they are entered on the books, would result in many items never being included in the determination of a net income for any year. Petitioners are advised and believe that the provisions of clause (3) of the third paragraph of subdivision L of the plan quoted above constitute a defect in the plan which should be cured by the Court under the provisions of subdivision V of the plan. Petitioners propose that the aforesaid defect in the plan should be cured by revising such provisions of clause (3) so that said clause will provide:

“* * * (3) debits or credits to adjust income in prior years shall be treated as income items for the year in which entered on the books, whether cleared through income or profit and loss accounts.”

Wherefore, your petitioners pray for an order of this Court:

(a) Construing the provisions of the plan of reorganization which are set forth in paragraph 3 hereof and authorizing and directing petitioners, as the Reorganization Committee under the plan, to provide for the issuance of 4.67 shares of new common stock in payment of accrued and unpaid interest, to January 1, 1939, of \$266.66 $\frac{2}{3}$ on each \$1,000 principal amount of First Mortgage bonds;

(b) Construing the provisions of the plan of reorganization of the debtor which are set forth in paragraph 5 hereof, reconciling the inconsistencies and curing the defects pointed out in paragraphs 6 to 17 hereof, and instructing petitioners, as such Reorganization Committee, as to the number and face amounts of new securities to be issued to The Railroad Credit Corporation under subdivisions P and R of the plan;

(c) Determining the extent of the lien of The Railroad Credit Corporation upon the claims against Standard Realty and Development Company and Sacramento Northern Railway referred to in paragraph 9 hereof and the rights of The Railroad Credit Corporation in respect of the payments referred to in paragraph 12 hereof;

(d) Curing the defect referred to in paragraphs 19 and 20 hereof, pursuant to the proposal of petitioners in paragraph 20 hereof;

(e) Curing the defect referred to in paragraph 21 hereof, pursuant to the proposal of petitioners in said paragraph and

(f) Granting such other and further relief as may be proper in the premises.

Respectfully submitted,

WHITMAN, RANSOM, COUL-
SON & GOETZ

Counsel for Petitioners

State of New York

County of New York—ss.

Robert E. Coulson, being first duly sworn, deposes and says:

That he is a member of the Reorganization Committee of The Western Pacific Railroad Company; that he has read the foregoing petition and knows the contents thereof and the same is true of his own knowledge, except as to the matters which are therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

ROBERT E. COULSON

Subscribed and sworn to before me this 5th day of May, 1944.

[Notarial Seal]

BEATRICE C. CUNNINGHAM

Notary Public, New York
County

N. Y. Co. Clk's No. 212 Reg. No. 425C6

Kings Co. Clk's No. 173 Reg. No. 319C6

Bronx Co. Clk's No. 38 Reg. No. 140C6

Queens Co. Clk's No. 757 Reg. No. 209C6

Certificate filed in Richmond County

Commission Expires March 30, 1946 [75]

EXHIBIT A

Accommodation Collateral. The debtor, The Western Pacific Railroad Company, objects to the provision of subdivision R of the Commission's final order, approved by the District Court, directing that

"All collateral pledged by the debtor as security for notes to the Reconstruction Finance Corporation, the Railroad Credit Corporation, and the A. C. James Company shall be reduced to possession by the respective pledgees thereof, and shall be by them surrendered to the reorganized company and canceled, . . ." 233 I.C.C. 453; 34 F. Supp. 493, 505.

This order arises from the following circumstances. As is shown on page 455, *infra*, the Reconstruction Finance Corporation, the Railroad Credit Corporation and A. C. James Company have notes of the debtor secured by pledges by the debtor of various amounts of the debtor's General and Refunding bonds and other collateral.

To assist the debtor in obtaining the Reconstruction Finance Corporation and Railroad Credit Corporation loans, the A. C. James Company furnished to the debtor's block of refunding bonds, previously issued to A. C. James Company by the debtor, and Western Pacific Corporation furnished to the debtor other collateral described in the Commission finding. These securities were a part of those then pledged by the debtor to secure the notes held by Railroad Credit Corporation and Reconstruction Finance Corporation, which knew the source of the collateral at the time.

The debtor's objection to the Commission's order is stated by it as follows:

"In substance, the Commission provided that the collateral owned and pledged by the Debtor should be surrendered to the reorganized Company but that the accommodation collateral borrowed from others and pledged by the Debtor should be confiscated; or, to state the proposal somewhat differently, the accommodation collateral is to be resorted to first instead of last as is required by the most elemental principles of equity and by the authorities cited below."

We think, however, that the objection is not sound and that the Commission's order is correct. These are our reasons: The refunding bonds pledged by the debtor to secure the A. C. James Company note and left in that position throughout were pledged directly by the debtor and are not accommodation collateral in any sense. Nor do we need give consideration to the accommodation collateral behind the Reconstruction Finance Corporation and Railroad Credit Corporation notes other than the refunding bonds. In the earlier order approving the plan, the Commission provided that the rights of the Reconstruction Finance Corporation and Railroad Credit Corporation "in collateral pledged with them by parties other than the debtor" should not be disturbed or altered. 230 I.C.C. 102; subdivision 0 of the order of October 10, 1938, *id.* 114. On consideration of the petitions for modification [76] of this order, the Commission refused to direct that this collateral be "sur-

rendered to the pledgors thereof.” 233 I.C.C. 431, 432. In its order, however, promulgating the present plan there is no clause comparable to subdivision O of the previous order preserving the rights of Reconstruction Finance Corporation and Railroad Credit Corporation in the collateral pledged with them by “parties other than the debtor.” The sole provision in the final order as to the collateral behind the Reconstruction Finance Corporation and Railroad Credit Corporation is that found in subdivision R and quoted at the opening of this section of this opinion, directing the collateral pledged by the debtor with Reconstruction Finance Corporation, Railroad Credit Corporation and A. C. James Company, be reduced to possession, surrendered to the reorganized company and canceled. This was entirely proper. None of the collateral, other than the refunding bonds, was a claim against the debtor. A. C. James Company and the Western Pacific Corporation perhaps had unsecured claims against the debtor for their securities and other collateral which the debtor had borrowed but these were held worthless as claims against the debtor. 233 I.C.C. 452. This collateral, other than the refunding bonds, was therefore left with the pledgees with its position unaffected by any direct action of the Commission.

The “collateral pledged by the debtor” referred to in the excerpt from subdivision R of the Commission’s final order, 233 I.C.C. 453, quoted above, can be only the general and refunding bonds of

the debtor, including those previously furnished by A. C. James Company. The words used in subdivision R to describe them are the same used by the Commission in distinguishing the refunding bonds from the remainder of the accommodation collateral. 233 I.C.C. 431, 432. Of course the collateral loaned to the debtor which was not an obligation of the debtor could not be ordered by the plan to be canceled. It remained with the pledgees. This "collateral pledged by the debtor" was properly to be reduced to possession by the pledgees, surrendered and canceled. For these bonds, furnished by A. C. James Company, held as collateral with other bonds of the debtor, the Reconstruction Finance Corporation and Railroad Credit Corporation received their allotment of new securities, 230 I. C. C. 101, as modified by the Reconstruction Finance Corporation arrangement, described in this opinion at page 485. See 233 I.C.C. 414, 452. The A. C. James Company unsecured claim against the debtor for the loan of the bonds is valueless, 233 I.C.C. 452, and the plan does not deal with any possible claim of accommodation pledgors against pledgees of bonds which were not the property of the debtor.

[Endorsed): Filed May 9, 1944. [77]

[Title of District Court and Cause.]

No. 26591-S

ORDER PROVIDING FOR HEARING UPON
PETITION OF REORGANIZATION COM-
MITTEE FOR AN ORDER CONSTRUING
PLAN OF REORGANIZATION IN VARI-
OUS RESPECTS AND RECONCILING IN-
CONSISTENCIES THEREIN

Upon due consideration of the petition of Fred-
erick H. Ecker, Frank C. Wright and Robert E.
Coulson, the duly constituted Reorganization Com-
mittee designated to carry out the plan of reorgan-
ization of the debtor above named, for an order
construing the plan of reorganization in various
respects and reconciling inconsistencies therein,

It Is Hereby Ordered as follows: [78]

1. That said petition be and it hereby is set
for hearing before this Court on June 2, 1944 at
10 o'clock, A. M.

2. That said Reorganization Committee be and
they hereby are directed to give notice of the said
hearing substantially in the following form:

LEGAL NOTICE

In the District Court of the United States for the
Northern District of California, Southern Division

No. 26591-S

In the Matter of
THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

NOTICE OF HEARING UPON PETITION OF
REORGANIZATION COMMITTEE FOR
AN ORDER CONSTRUING PLAN OF RE-
ORGANIZATION IN VARIOUS RE-
SPECTS AND RECONCILING INCONSIS-
TENCIES THEREIN

Notice Is Hereby Given, pursuant to the order of the above named Court, that a hearing will be held before the Honorable A. F. St. Sure, Judge of the above entitled court, at the Court Room of the said Judge, in the United States Post Office and Court House Building, Seventh and Mission Streets, in the City and County of San Francisco, State of California, on June 2, 1944, at 10 o'clock, A. M., upon the petition of Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, the duly constituted Reorganization Committee designated to carry out the plan of reorganization of the debtor above named, for an order construing the plan of

reorganization in various respects and reconciling inconsistencies therein.

WHITMAN, RANSOM, COUL-
SON & GOETZ,

Counsel for the Reorganization Committee of The
Western Pacific Railroad Company

3. That the said notice be given by mailing prior to the 20th day of May, 1944, a copy of this order and a copy of said petition to the following parties:

1. Crocker First National Bank of San Francisco and Samuel Armstrong. [79]

2. Irving Trust Company.

3. A. C. James Co.

4. Reconstruction Finance Corporation.

5. The Railroad Credit Corporation.

6. The Chase National Bank of the City of New York.

7. The Western Pacific Railroad Corporation.

8. The Western Pacific Railroad Company.

9. The Western Realty Company.

10. Central Hanover Bank & Trust Company.

11. Allan P. Matthew, as counsel for the Reorganization Trustees.

12. The Institutional Bondholders Committee.

Dated, May 9, 1944.

A. F. ST. SURE
Judge.

[Endorsed]: Filed May 9, 1944.

[Title of District Court and Cause.]

No. 26591-S

APPEARANCE

To the Clerk of the Above-Entitled Court:

Please enter my appearance as one of the attorneys for The Railroad Credit Corporation in the above-entitled matter, in association with Edward G. Buckland, Esq., and William J. Kane, Esq., my address is #333 Montgomery Street, San Francisco, 4, California, telephone: YUkon 1977.

ARTHUR B. DUNNE

[Endorsed]: Filed Jun. 5, 1944.

[Title of District Court and Cause.]

No. 26591-S

CORRECTED MEMORANDUM OPINION AND ORDER CONSTRUING PLAN OF REORGANIZATION

The Reorganization Committee seeks an order construing the plan of reorganization. Section V of the plan provides that "The Court may cure any defect, supply any omission, or reconcile any inconsistency in such manner or to such extent as may be necessary or expedient in order to carry out the plan effectively."

A. No objection is made to, and Division 4 of the Interstate Commerce Commission approves the proposals of the Committee for a construction of the plan in the following respects:

1. In its report of June 21, 1939, the Interstate

Commerce Commission stated as to the allotment of new securities to First Mortgage bondholders:

“Based upon our conclusion as to the relative priority, value, and equity of the various claims and the value of the new securities available in exchange therefor, we find that the new securities should be allotted as follows: (1) First-Mortgage bondholders, \$19,716,040 of income-mortgage bonds, [82] \$29,574,060 of preferred stock, and 230,593 shares of common stock, the common stock to be taken at the price of \$57 a share; * * *” (233 I.C.C. Rep. 417.)

Paragraph 2 of subdivision P of the plan provides:

“Holders of existing first-mortgage bonds shall receive for each \$1,000, principal amount thereof, together with \$266.66 $\frac{2}{3}$ of interest accrued and unpaid thereon to January 1, 1939, approximately \$400 of income-mortgage $4\frac{1}{2}$ -percent bonds, series A, being 40 percent of the principal amount of said existing bonds; \$600 of 5-percent preferred stock, series A, being 60 percent of the principal amount of said bonds; and 4.67 shares of common stock, being common stock taken at the price of \$57 a share for 100 percent of said accrued and unpaid interest.” (233 I.C.C. Rep. 451)

Petitioners allege that the issue of 4.67 shares of common stock at the price of \$57 a share would not equal the exact amount stated of \$266.66 $\frac{2}{3}$ as the accrued and unpaid interest to January 1, 1939, on \$1,000 principal amount of first mort-

gage bonds; nor would the issue of common stock at the rate of 4.67 shares in respect of the accrued and unpaid interest on each \$1,000 principal amount of existing First Mortgage bonds result in an aggregate issue of 230,593 shares of common stock in respect of the aggregate of accrued and unpaid interest to January 1, 1939, upon all outstanding First Mortgage bonds.

The proposal of the petitioners that there be issued 4.67 shares of common stock in respect of all accrued and unpaid interest to January 1, 1939, in the amount of 266.66 $\frac{2}{3}$ on each \$1,000 principal amount of First Mortgage bonds, resulting in an aggregate issue under the plan of 230,184.767 shares of common stock in respect of the aggregate of accrued and unpaid interest to January 1, 1939, upon all First Mortgage bonds, is approved. [83]

2. Petitioners allege that the requirements of the second paragraph of Subdivision L of the plan, that the income and fixed charges of only the "wholly owned railway subsidiaries" of the debtor and the reorganized company shall be included in the determination of available net income for any year, presents a defect and inconsistency in the plan, and that the court should interpret the term "wholly owned railway subsidiary" of the debtor as including Tidewater Southern Railway Company (97.97% of the stock of that company being owned by the debtor), and also any railway corporation substantially all (95% or more) of the stock of which shall be owned by the reorganized company. The proposal is approved.

3. Subdivision L of the plan provides in part “* * * (3) debits or credits to adjust income in prior years shall be treated as income items for the year in which entered on the books, whether cleared through income or profit and loss accounts, so far, but only so far, as such debits and credits reflect cash receipts or disbursements in the year in which they are entered on the books.”

Petitioners allege that accounts have been and will be kept on an accrual basis, and that it will be necessary to adjust each year in respect to items set up as estimates or against contingencies; and that the language underlined above would prevent this adjustment. Petitioners propose that clause (3) be revised to provide “* * * (3) debits or credits to adjust income in prior years shall be treated as income items for the year in which entered on the books, whether cleared through income or profit and loss accounts.” The proposal is approved. [84]

B. Two contested questions are presented by the petition with regard to the claim of the Railroad Credit Corporation against the debtor. The Interstate Commerce Commission has made no recommendation with regard thereto, and has stated that these are matters to be determined by the court.

1. Paragraphs 4 and 5 of subdivision P of the plan provide:

“4. The Railroad Credit Corporation shall receive in respect of its claim in the principal amount of \$2,455,610 together with \$146,503 of interest accrued and unpaid thereon to January

1, 1939, subject to the reduction of said amounts by the application, prior to the date of issue of the new securities under the plan, of any proceeds from the distributive shares of the company or its subsidiaries under the marshaling and distributing plan, 1931, approximately \$154,111 of income-mortgage 4-1/2 percent bonds, series A; \$241,681 of 5-percent preferred stock, series A; and 35,425 shares of common stock, being common stock taken at the price of \$62 per share. The Railroad Credit Corporation's equity in the collateral securing the claim of the Reconstruction Finance Corporation is found to be without value." (233 I.C.C. Rep. 452)

"5. The A. C. James Company shall receive in respect of its claim in the principal amount of \$4,999,800, together with \$1,249,950 of interest accrued and unpaid thereon to January 1, 1939, \$163,724 of income-mortgage 4 1/2-percent bonds, series A; \$256,756 of 5-percent preferred stock, series A; and 37,635 shares of common stock, being an amount of common stock which bears to the amount of common stock allotted to the claim of the Railroad Credit Corporation the same proportion that the principal amount of general and refunding mortgage bonds of the debtor held by the A. C. James Company as collateral for said claim, bears to the principal amount of such bonds held by the Railroad Credit Corporation as collateral for its claim." (233 I.C.C. Rep. 452)

Subdivision R of the plan provides in part:

“* * * All collateral pledged by the debtor as security for notes to the Reconstruction Finance Corporation, the Railroad Credit Corporation, and the A. C. James Company shall be reduced to possession by [85] the respective pledgees thereof, and shall be surrendered by them to the reorganized company and canceled, except that the Railroad Credit Corporation shall not release or surrender any right or interest in the distributive shares of the debtor or its subsidiaries under the marshaling and distributing plan, 1931, but any proceeds from such distributive shares after the effective date of the plan shall become the property of and be retained by the Railroad Credit Corporation, but to the extent to which received prior to the issue of the new securities under the plan shall be applied in reduction of the claim of the Railroad Credit Corporation in respect of which such new securities are to be issued at the rates provided in subdivision P. * * *”
(233 I.C.C. Rep. 453)

The Railroad Credit Corporation has received since January 1, 1939, the effective date of the plan, proceeds from the distributive shares of the debtor and its subsidiaries under the marshaling and distributing plan of 1931 \$26,091.72, and may receive further proceeds prior to the issue of the new securities under the plan.

Petitioners contend that the amount of secur-

ities to be allocated to the Railroad Credit Corporation under paragraph 4 of subdivision P should be reduced by the proceeds of these distributive shares received or to be received by it prior to the issue of the new securities.

The Railroad Credit Corporation claims that while these payments will reduce the amount of its claim, that it is entitled to all securities allotted to it under paragraph 4 of subdivision P, on the ground that the new securities are based on the amount of general and refunding mortgage bonds held by it as collateral for its claim, and not on the amount of its claim; and further, that the market value of the new securities is totally insufficient to satisfy the claim. [86]

This court, in its opinion approving the reorganization plan, (*In re. Western Pac. R. Co.*, 34 F. Supp. 493, 498) said:

“RCC and ACJ are allotted new securities on the following basis: From the new securities, which the Commission finds are properly issuable in respect of the refunding mortgage bonds held as collateral for the RFC, RCC, and ACJ notes, are deducted that proportion of each class which the principal amount of refunding mortgage bonds held by RFC as collateral bears to the total amount of pledged refunding mortgage bonds. The balance of such new securities is then divided between RCC and ACJ in proportion to the principal amounts of refunding mortgage bonds held by them respectively as collateral. * * *”

In its approval of the plan issued October 10, 1938 (later modified in other respects) the intention of the Interstate Commerce Commission is shown: "The value of each of the claims is proportionate to the collateral securing it, and we find that the allotment of the stock should be made on the basis of the collateral held rather than on the amount of the claims."

There is no doubt that the allotments were made on the basis contended for by the Railroad Credit Corporation. However, while the A. C. James Company is allotted on a total claim of \$6,249,750 new securities of the face value of only \$2,853,850, the Railroad Credit Corporation will receive on a total claim of \$2,602,113 new securities of the face value of approximately \$2,592,142. The fact that the value of the securities so closely approaches the amount of the claim of the Railroad Credit Corporation must have been the reason for the language used in paragraph 4 of subdivision P and in subdivision R. Otherwise it becomes mere surplusage. The Claim of the Railroad Credit Corporation would of course be reduced by payments received from [87] any source at any time, but only proceeds from the distributive shares received prior to the issuance of the new securities are mentioned as reducing its claim within the contemplation of the plan: "but to the extent to which received prior to the issue of any securities under the plan (the proceeds) shall be applied in reduction of the claim of the Railroad Credit Corporation in respect to which such new securities are to be issued

at the rates provided in subdivision P.” The use of the words “at the rates” rather than “in the amounts” further indicates the intention that the amount of securities as well as the claim is to be reduced by the amount of such proceeds. This intention also appears from the qualifying word “approximately” which appears before the description of the securities in paragraph 4 of subdivision P. In paragraph 5, describing the securities to be issued to the A. C. James Co., which had no interest in the distributive shares, this word is not used.

I conclude that the construction contended for by petitioners is proper.

2. The Western Pacific Railroad Corporation pledged and assigned advances made by it to Standard Realty and Development Company and to Sacramento Northern Railway, the wholly owned subsidiaries of the debtor, as partial security for the debt of the debtor to the Railroad Credit Corporation. Since January 1, 1939, the Western Pacific Railroad Corporation has received from Standard Realty \$42,500 principal and \$22,855.97 interest on account of these advances. Of these sums the Western Pacific Railroad Corporation has paid over to the Railroad Credit Corporation [88] \$17,500 principal and \$20,102.10 interest. Further payments will be made by Standard Development prior to the issue of the new securities under the plan.

Western Pacific Railroad Corporation claims that the new securities to be allotted to the Railroad Credit Corporation under the plan constitute payment in full of its claim, and that the pledge

agreement should be returned to the Western Pacific Railroad Corporation and cancelled.

The Railroad Credit Corporation claims that its rights under the pledge agreement are not affected by the issuance of the new securities to it; that the allotment of such securities is predicated solely upon the refunding mortgage bonds of the debtor which it held as security; and that it is entitled to proceed against the collateral so pledged in the event that the actual value of the new securities shall not equal the amount of its claim.

The plan is silent with regard to the pledged collateral, and the Supreme Court said (318 U. S. 448), “* * * Of course the collateral loaned to the debtor which was not an obligation of the debtor could not be ordered by the plan to be cancelled. It remained with the pledgees.”

The Western Pacific Railroad Corporation is attempting to do what the Supreme Court said could not be done by the plan. If the Railroad Credit Corporation were in the position of the A. C. James Co. and would receive securities of the face value of less than half the amount of its claim, it could not be contended that the acceptance of the most that could be allotted to it from the assets of the debtor under the plan would release any outside collateral which it might hold. It follows that if the market value [89] of the securities is much less than their face value, as contended by the Railroad Credit Corporation, and it will not be able to realize thereon enough to satisfy its claim, it is not made whole nevertheless by the allotment to it of securities of a face value approximating

the amount of its claim, as contended by the Western Pacific Railroad Corporation. As a junior claimant it has consented to accept from the debtor's estate as much as it has been found entitled to. There is no presumption that it has been made whole. It is fortunate enough to have outside collateral against which it can proceed if the estate of the debtor cannot satisfy the claim.

I conclude that the contention of the Railroad Credit Corporation should be sustained.

It is so ordered. Counsel for petitioners may submit decree accordingly.

Dated: June 21, 1944.

A. F. ST. SURE

United States District Judge

[Endorsed]: Filed Jun. 22, 1944. [90]

In the Southern Division of the United States District Court, in and for the Northern District of California

No. 26591-S

In the Matter of

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

Before: Hon. A. F. St. Sure, Judge.

HEARING ON PETITION FOR ORDER CON-
STRUING PLAN OF REORGANIZATION
IN VARIOUS RESPECTS AND RECON-
CILING INCONSISTENCIES THEREIN

Friday, June 2, 1944

Counsel Appearing:

For Reorganization Committee:

Messrs. Pillsbury, Madison & Sutro,

By Felix T. Smith, Esq.

Robert E. Coulson, Esq.

For Reorganization Trustees:

Allan P. Matthew, Esq.

Burnham Enersen, Esq.

For Railroad Credit Corporation:

Edward G. Buckland, Esq.

LeRoy R. Goodrich, Esq.

For Debtor:

Frank S. Nicodemus, Esq.

M. C. Sloss, Esq.

Stephen Duhring, Esq. [93]

[Title of District Court and Cause.]

No. 26591-S

REPORTER'S TRANSCRIPT

Mr. Matthew: If it please the Court, may we first take up the joint petition of the Reorganization Committee and the Reorganization Trustees for an order authorizing agreements with the Commissioner of Internal Revenue in respect to the establishment of depreciation accounting as to the road properties of the Western Pacific Company, and likewise two of its railway subsidiaries, the Tidewater Southern Railway and the Sacramento Northern Railway.

Notice of this hearing has been given as required by the order of the Court, and an affidavit to that effect is on file.

May I state to your Honor briefly that heretofore it has been the practice of the Western Pacific Railroad Company, in conformity with the conventional practice, to provide for depreciation in accordance with the so-called retirement method. That is, there has been retirement accounting, rather than depreciation accounting. Under that method there is no accumulation of depreciation reserve. There is no actual depreciation charged. Whenever a property is retired by reason of obsolescence or destruction the cost of the item is treated as an expense incurred at the time of the retirement. I am advised under this practice of retirement accounting the average charge for retirements for the five-year period extending from 1938 through 1942 was approximately \$133,000 per year, that is, for the debtor company alone.

Now, the Interstate Commerce Commission has recently made an order requiring all steam railroads to establish depreciation accounting for road properties. These instructions apply directly to the Western Pacific Railroad, and likewise to the Tidewater Southern Railroad Company. They do not apply directly to the Sacramento Northern Railway because that is not a steam [94] railroad property, but it is thought desirable, in order to standardize the accounts of the debtor and all its railroad subsidiaries to establish depreciation accounting for the Sacramento Northern Railroad, as well as for the Tidewater Southern Railroad and the Western Pacific.

For sometime past there have been negotiations with the Commissioner of Internal Revenue, looking toward an agreement in which this change from retirement accounting to depreciation accounting shall take place in a manner acceptable to the Bureau of Internal Revenue. That is, of course, for tax purposes. The request of those negotiations is set forth in a letter from the Commissioner to the Western Pacific Railroad Company, dated April 27, 1944, a copy of that letter being annexed to this petition as Exhibit A.

That letter sets forth certain schedules in detail, with the suggested annual depreciation rates which are acceptable to the Commissioner, and it is contemplated that the depreciation accounting shall become effective commencing with January 1, 1943. The letter of the Commissioner also sets forth certain conditions which are to be observed, and a letter accepting those conditions must be filed with

the Commissioner on or before June 15th. There must be a letter for each of the properties, for the Western Pacific, for the Tidewater Southern, and for the Sacramento Northern.

The Reorganization Committee, as I have stated, has joined with the Reorganization Trustees in this petition. The petitioners feel that it is to the best interests to the estate of the Debtor to accept the terms and conditions imposed by the Commissioner of Internal Revenue in his letter of April 27th. I shall state to the court that it is estimated that the annual [95] charge for depreciation of road properties of the Debtor alone will be in the neighborhood of \$400,000, or approximately three times the annual charges heretofore permitted under the retirement method. These increased deductions will, of course, bring about a proportionate reduction in income and excess profit taxes.

I think I need not comment on the conditions imposed by the Commissioner in his letter. They seem acceptable. I think at this point I would like to call Mr. Elsey briefly for testimony.

The Court: Very well.

CHARLES ELSEY,

called as a witness on behalf of petitioners; sworn.

Direct Examination

Mr. Matthew: Q. Mr. Elsey, are you familiar with the subject matter of this petition contemplating the change from retirement accounting to depreciation accounting?

A. Yes, sir.

(Testimony of Charles Elsey.)

Q. Are you familiar with the letter of the Commissioner of Internal Revenue dated April 27, 1944? A. Yes.

Q. In which certain conditions are set forth?

A. Yes, sir.

Q. Will you state briefly, please, the reasons for this proposed change from retirement accounting to depreciation accounting?

A. The Western Pacific and the Tidewater Southern are required to change from retirement to depreciation accounting, and it is my belief that the Sacramento Northern should do likewise, so that the accounting practices on our three properties should be on a uniform basis. The change over from one accounting practice to another will bring up quite a number of tax problems, and it is my belief that we should settle as many [96] of these problems by entering into this agreement with the Commissioner of Internal Revenue in advance so that we will be able to compute our taxes more accurately, and also do away with this countless controversy, as far as depreciation rates in the future are concerned. Our tax counsel advises me that if we enter into this agreement with the Commissioner it will very materially reduce our income and excess profit taxes.

Q. Do you agree that this is the best arrangement that can be made at this time?

A. Yes, I do.

Q. Would it be in the interest of the estate of the debtor and likewise in the interest of the Tide-

(Testimony of Charles Elsey.)

water Southern and the Sacramento Northern that these agreements be made?

A. Very much so.

The Court: Is there any objection to the granting of this petition?

Mr. Smith: No, your Honor.

The Court: I suppose due notice has been given?

Mr. Matthew: Yes, your Honor. An affidavit to that effect is on file.

The Court: The petition is granted.

Mr. Smith: Your Honor, there is another petition on the calendar this morning, a petition by the Reorganization Committee, and I ask leave to file the affidavit of Henry G. Henn, showing the serving of the notice of this hearing. This petition is for the purpose of construing and reconciling various inconsistencies in the plan that has heretofore been approved by this Court for the reorganization of the railroad. Some of them are matters of detail that will not take a great deal of your Honor's time, but the chief questions relate to relations between this corporation and the debtor and certain subsidiaries, and for that [97] reason I should like to call Mr. Elsey to the stand, if you will, Mr. Elsey, and testify to those relationships.

CHARLES ELSEY,

called as a witness on behalf of petitioner; sworn.

Direct Examination

Mr. Smith: Q. Mr. Elsey, what is the Standard Realty & Development Company?

A. The Standard Realty & Development Company is a solely owned subsidiary of the Western Pacific Railroad, all of the stock being owned by the Western Pacific and deposited under the Western Pacific first mortgage.

Q. How about its indebtedness?

A. What is that?

Q. How about its indebtedness.

A. Practically all of its indebtedness is owed to the Western Pacific Railroad Company.

Q. Are you familiar with the allegations regarding the Standard Realty & Development Company's affairs set forth in subdivision 3 of this petition that is on file here? A. Yes, sir.

Q. Are they correctly stated there?

A. Yes, sir.

Q. Can you explain this indebtedness of \$110,000 that is mentioned in that subdivision and give the Court the history of that indebtedness?

A. I can't hear.

Q. Can you give the Court the history of that indebtedness of \$110,000 which is there discussed?

A. Yes, sir.

Q. Please do so.

A. The Interstate Company, which operated a summer resort in the Feather River Canyon—its

(Testimony of Charles Elsey.)

facilities were burned down—and in order to rebuild them they wished to secure a loan of \$125,000. The Western Pacific Railroad Company could not make the loan, and it was then agreed that the Western Pacific Railroad Corporation should make the loan, but inasmuch as it did not wish to do business in California, it made the loan through [98] the Standard Realty & Development Company. The Standard Realty & Development Company to that extent is trustee for the Western Pacific Railway Corporation.

Q. And this \$110,000, as I understand it, is the balance unpaid on that indebtedness that was owed by the Interstate Company to the Standard Realty Company and in turn owed by Standard Realty & Development Company to Western Pacific Railroad Corporation? A. That is correct.

Q. And that was pledged by Western Pacific Railroad Company with the Railroad Credit Corporation? A. Yes, sir.

Q. What is the Sacramento Northern Railway?

A. The Sacramento Northern Railway is a railroad operating from Oakland through the Sacramento Valley, all of its stock being owned by the Western Pacific Railroad Company, and all of its first mortgage bonds, except participating certificates in the amount of \$188.38, are of a total outstanding of \$5,224,373.14. All of the stock and the bonds are owned by the Western Pacific Railroad Company and are pledged under the Western Pacific's first mortgage.

(Testimony of Charles Elsey.)

Q. What is the Tidewater Southern?

A. The Tidewater Southern is a steam railroad operating from Stockton down through the San Joaquin Valley to Turlock, and practically all of its stock is owned by the Western Pacific Railroad Company.

Q. The petition states the facts about that and gives the figure as 97.97 percent. Are the statements in the petition correct? A. Yes, sir.

Q. Is the Tidewater Southern generally treated as a wholly-owned railway subsidiary of the debtor?

A. Yes, sir.

Q. Do you consolidate those accounts in your accounting?

A. Well, under the plan of reorganization.

Mr. Smith: I think those are the only questions we want [99] to ask Mr. Elsey, but if there are any other counsel who want to ask him——

The Court: Does any counsel present wish to ask Mr. Elsey any questions? That is all, Mr. Elsey.

Mr. Smith: Mr. DeGrath.

D. C. DE GRATH

called as a witness on behalf of the petitioner;
sworn.

Direct Examination

Mr. Smith: Q. What is your name?

A. D. C. DeGrath.

Q. Where do you live, sir?

(Testimony of D. C. De Grath.)

A. San Francisco.

Q. What is your occupation?

A. I am General Auditor of the Western Pacific Railroad.

Q. Are you familiar with the petition that has been filed here by the Reorganization Committee?

A. Yes.

Q. In particular, I call your attention to the allegations regarding the Standard Realty & Development Company and the indebtedness that has been discussed by Mr. Elsey in his testimony. What are the present facts regarding that indebtedness? Has it been paid?

A. Paid? I don't quite understand your question. Paid by whom?

Q. By the Standard Realty & Development Company. Do you keep the books of the Standard Realty & Development Company?

A. Yes.

Q. Well, there was an indebtedness of \$110,000. Now, have there been any payments made on that account since January 1, 1939?

A. I don't get your question yet. This \$110,000——

Q. Yes.

A. I don't understand. You are talking about this Interstate——

Q. Yes, I am talking about the Interstate matter. A. The Interstate proposition? [100]

Q. Yes.

A. Well, the total amount of that Interstate

(Testimony of D. C. De Grath.)

obligation to the Standard Realty & Development Company has been paid.

Q. It has been paid? A. It has been paid.

Q. That is what I want to know, and to whom was that paid?

A. Paid to the Standard Realty & Development Company.

Q. And then what did the Standard Realty & Development Company do?

A. The Standard Realty & Development Company paid over all the money to the Western Pacific Railroad Corporation, except \$67,500 of the principal.

Q. How much of that payment was made since January 1, 1939. The petition states, Mr. DeGrath, that since January 1, 1939 there has been \$42,500 of the principal and \$22,855.97 of interest paid.

A. Well, there has been \$17,500 of the principal paid.

Q. By whom?

A. That is an error. There has been \$42,500 paid on the principal.

Q. That has been paid by Standard Realty & Development Company to Western Pacific Railroad Corporation? A. That is right.

Q. And how much interest?

A. And there has been \$22,855.97 interest paid.

Q. Do you know or have any information about what the Western Pacific Railroad Corporation has done with that money?

A. Well, we have been notified that \$17,500 of

(Testimony of D. C. De Grath.)

that principal has been paid to the Railroad Credit Corporation and \$20,102.10 of the interest.

Q. What is the balance of the other indebtedness of the Standard Realty & Development Company to Western Pacific Railroad Company, the debtor here?

A. On account of this particular transaction——

Q. No, this other indebtedness.

A. Well, the Western Pacific holds the Standard's note for \$251,000, and there is some \$300,000 advanced. [101]

Q. It is stated in the petition that the demand note is \$251,273.07; is that figure correct?

A. That is correct.

Q. It is stated in the petition that the open account is \$363,310.86, and I am informed that since then there has been a payment, so that that should be \$303,310.86.

A. That is correct.

Q. And those sums are owing by Standard Realty & Development Company to the debtor?

A. That is right.

Q. Now, it is alleged in the petition that the Sacramento Northern Railroad Company owes the debtor for advances on open account \$1,949,356.42; is that figure correct?

A. It is \$170,000 less than the figure shown in the petition.

Q. So that it should be \$1,749,356.42?

A. Correct.

Q. Do you know about an indebtedness of the Sacramento Northern Railway amounting to \$856,-

(Testimony of D. C. De Grath.)

260 to the Western Pacific Railroad Corporation?

A. That is the amount we are carrying on the Sacramento Northern Railway account as due the Western Pacific Corporation for advances.

Q. Do you know whether there have been any payments on that account?

A. There have not.

Q. Is that account represented by any instrument, note, or any other thing?

A. Not that I know of.

Q. How long has that account been there on the books?

A. That total amount, \$416,260, was advanced to the San Francisco-Sacramento Railroad Company, and that was assumed by the Sacramento Northern Railway at the time they purchased the San Francisco & Sacramento Railway, and the \$440,000 was advanced to the Sacramento Northern Railway; in May, 1928, \$200,000; June, 1928, \$120,000; December, 1928, \$120,000.

Q. And those were the last transactions in that account?

A. Yes, except interest on these advances at 5 percent per annum to and [102] including October 31, 1931.

Subsequent to that date accruals have been made in the accounts of the Sacramento Northern Railway for this interest, and the account so accrued is carried as a part of a non-negotiable debt to affiliated companies, but there has been nothing paid on that and no payments on the principal since October 31, 1931.

(Testimony of D. C. De Grath.)

Q. Has there been any waiver of the statute of limitations? A. I have never seen any.

Mr. Buckland: What was that last question?

Mr. Smith: I asked him if there had been any waiver of the statute of limitation on this indebtedness. That is all.

The Court: Any further questions of Mr. DeGrath?

Cross-Examination

Mr. Buckland: Your Honor, the assignment, of which I have here a photostatic copy, indicates that there were pledged, assigned to the Railway Credit Corporation by the Western Pacific Railroad Corporation the Standard Realty & Development Company obligation in the sum of \$120,000 for advances to said Standard Realty & Development Company.

Q. Is that in accord with your accounting, Mr. DeGrath?

A. I presume that is correct, at the time when that assignment was made.

Mr. Buckland: The difficulty I have is that in the petition for clarification you speak of \$110,000, and then you also speak of certain partial payments that have been made amounting to \$17,500, and it is not clear, to my mind, just what your testimony now amounts to with respect to the amount of principal and interest on that Standard Realty & Development Company claim, not speaking of the other for the time being.

(Testimony of D. C. De Grath.)

This, Mr. Smith, is a photostat of the original note. [103]

Q. What I am trying to find out from you, Mr. DeGrath, is what your account shows has been paid by the Standard Realty & Development Company, first on account of principal, reducing the principal amount, and, second, the accrued interest.

A. Well, on account of the principal—do you want the dates of these?

Q. Yes, please.

A. In February, 1940, there was \$3500. In July, 1941, \$3500. In August, 1941, \$3000.

Q. And all of those, as you are going on, were applied to principal in each case?

A. That is the payment on the principal of that Interstate Company's note received by the Standard and turned over to the Western Pacific Railroad Corporation.

Q. Please proceed with those payments.

A. In July, 1942, \$4000; January, 1943, \$3500; April, 1943, \$5000; June, 1943, \$20,000. That is a total of \$42,500 on account.

Q. All of that applied to principal?

A. All of that applied to principal.

Q. So that if so applied, it would reduce the amount of the original \$120,000 which was pledged to the Railroad Credit Corporation by \$42,500?

A. Yes.

Q. And there would not be the \$110,000 which is spoken of in the petition. Now, will you please let

(Testimony of D. C. De Grath.)

me know the dates of the credits of interest upon that principal sum?

A. In December, 1938, which was, by the way, paid after January 1, 1939, \$1247.67; in March, 1939, \$1,220.55; in June, 1939, \$1234.11; September, 1939, \$1,247.67; December, 1939, \$1247.67.

March, 1940, \$1210.95; June, 1940, \$1191.58; September, \$1204.67; December, 1940, \$1204.67.

March, 1941, \$1181.69; June, 1941, \$1194.84; September, 1941, \$1164.49; December, 1941, \$1134.46.

April, 1942, \$1109.59; June, 1942, \$1121.92; September, 1942, [104] \$1096.79; December, 1942, \$1088.88.

March, 1943, \$1026.37; June, 1943, \$968.12; September, 1943, \$759.38.

That made a total of \$22,855.97.

Q. That is what you have alleged in the petition?

A. Yes. Then a final interest payment received but not paid to the Western Pacific Corporation, and now held in the treasury of the Standard Realty & Development Company, December, 1943, final payment of interest \$567.12.

Q. For a time the payments that were made by the Standard Realty & Development Company, both on account of principal and on account of interest, came to the Railroad Credit Corporation; can you state how much of those payments that you have stated so came to the Railroad Credit Corporation? Have you any record of that?

A. We have been advised by the corporation that of that \$42,500 principal, \$17,500 has been paid

(Testimony of D. C. De Grath.)

to the Railroad Credit Corporation, and of the \$22,855.97 interest, \$20,102.10 has been paid to the Railroad Credit Corporation.

Q. The pledge of this obligation of the Standard Realty & Development Company was made by the Western Pacific Railroad Corporation; that is correct, is it not?

A. That is my understanding. I can't say positively about that, because I haven't anything to do with the accounts of the Western Pacific Railroad Corporation.

Q. But you do have to do with the accounts of the Standard Realty & Development Company?

A. Yes.

Q. Was the Standard Realty & Development Company advised of the assignment of that obligation as a pledge to the Railroad Credit Corporation?

A. I can't testify as to that.

Q. You know, however, that it had been so advised, did you not?

A. Yes. [105]

Q. Why, then, did the Standard Realty & Development Company not make payments direct to the pledgee of that obligation rather than through Western Pacific Railroad Corporation?

A. I can't answer that, except that we were doing business with the Railroad Corporation.

Q. But you knew that your obligation had been assigned and pledged to the Railroad Credit Corporation?

A. Yes.

Q. Then why weren't the payments made to the Railroad Credit Corporation instead of to the

(Testimony of D. C. De Grath.)

Western Pacific Railroad Corporation, which retained a part of them?

A. That never was called to my attention.

Q. It was called to your attention when demand was made upon you, was it not, by the Railroad Credit Corporation as to why further payments were not made?

A. I never saw a demand of that kind, myself.

Q. Then why did you stop paying, after you had paid \$17,500 to the Railroad Credit Corporation on account of principal and the other sum on account of interest, why did you stop paying to the Railroad Credit Corporation? Why was that stopped?

A. We never had any authority, so far as I was concerned, to pay any money to the Railroad Credit Corporation on this account. We did our business between the Standard and the Railroad Corporation.

Q. Even though the obligation had been assigned to somebody else who was entitled to payment?

A. Well, I never saw that assignment, myself.

Q. But you knew it had been made, did you not?

A. Yes, that is, I understand it had been.

Mr. Buckland: That is all.

Redirect Examination

Mr. Smith: Q. Let me get these figures straight, again. [106] What was the balance of this indebtedness of the Standard Realty & Development Company on January 1, 1939—principal?

A. I haven't those figures here.

(Testimony of D. C. De Grath.)

Q. You haven't those figures? A. No.

Q. You do know, however, there has been \$42,000 principal paid since that date? You have testified to those figures. A. Yes.

Q. \$42,500? A. Yes, that is correct.

Q. What is the unpaid balance of principal today? A. There is none.

Q. What happened to the difference? You said you were holding some interest, didn't you?

A. Yes.

Q. That is all.

A. No, we have \$67,500 of the principal money in the treasury of the Standard at the present time.

Q. That is what I am saying. You have \$67,500 of principal in the treasury of the Standard Realty & Development Company that that corporation owes to someone, and the discussion here is about to whom it shall pay the money, is that it?

A. That is it.

Q. All right. Now, \$67,500 will clean up the indebtedness when that is paid, is that right?

A. When that and that \$567.12 interest is paid.

Q. But so far as the principal is concerned, the \$67,500 is what you have now, and then there was \$42,500 paid since January 1, 1939?

A. That is right.

Q. Now, isn't it true that the balance of the principal on January 1, 1939, was \$110,000, the sum of those two figures? A. Yes.

Q. Mr. Buckland mentioned a figure of \$120,000. Do you understand that that was the balance

(Testimony of D. C. De Grath.)

of principal due on January 1, 1939, or that that was some earlier balance?

A. Well, I don't know. I am not sure what the \$120,000 means.

Q. You do not know where he got that figure?

A. No. [107]

Mr. Buckland: May I explain, for the information of the Court that the witness, I have here the original, or, rather, a photostat of the original assignment.

Mr. Smith: What is the date of that, Mr. Buckland?

Mr. Buckland: March 25, 1933, an assignment in the sum of \$120,000 for advances to the Standard Realty & Development Company. This is a pledge, Mr. Smith, that was made by the Western Pacific Railroad Corporation. What I am trying to do is to account for the difference between the \$110,000 that you mention in your petition, here, and this \$120,000 mentioned in the assignment, of which we have a photostat of the original.

Mr. Smith: Isn't that the fact, that \$120,000 was the balance as of the date, some date in March in 1933?

Mr. Buckland: But I have no testimony from this witness as to how that principal of \$120,000 was reduced to \$110,000, or any other figure.

Mr. Smith: That is just what I am trying to get from him.

Q. Mr. Buckland has a copy of an assignment dated in 1933 that states that the balance of the

(Testimony of D. C. De Grath.)

principal was \$120,000, while, according to your records on January 1, 1939 the balance of principal was \$110,000. Have you any record of payments made by Standard Realty & Development Company on account of the principal of this indebtedness between those dates?

A. Not with me, no. It is very likely that that \$10,000 difference was covered by payments made between the date of Mr. Buckland's figure and January 1, 1939, which reduced it \$10,000.

Mr. Smith: We shall be glad to have Mr. De-Grath obtain that information, possibly during the noon hour, and we can give it to Mr. Buckland so he will have the complete explanation of that. [108]

Mr. Buckland: I wish you would, and also if he would copy down those figures with references to payments of principal and interest to which he has just testified, we would appreciate it.

Mr. Smith: We will give you a statement. There is one other thing, your Honor:

Q. Do you know how much the Railroad Credit Corporation has received since January 1, 1939 under the Marshalling and Distributing Plan of 1931?

A. Those figures that are in the petition, there——

Q. Yes.

A. I checked those figures and they are correct.

Q. That figure is \$26,091.72.

A. That is right.

Mr. Smith: That is all.

Mr. Buckland: Just a moment. What figures were you referring to in your petition?

Mr. Smith: Page 5, line 45.

ROBERT E. COULSON,

called as a witness on behalf of Petitioner; sworn.

Direct Examination

Mr. Smith: Q. What is your name, Colonel?

A. Robert E. Coulson.

Q. Where do you live? A. New York.

Q. Are you a member of the Reorganization Committee appointed under this Plan of Reorganization of the Debtor by this Court? A. I am.

Q. Did you supervise the preparation of the petition that is on file here today? A. Yes.

Q. And you are familiar with its contents?

A. Familiar with it.

Q. And they are correct? A. Yes.

Q. In connection with the matters discussed in that petition, I [109] show you a letter. Did you receive that letter? A. I did.

Mr. Smith: I will offer in evidence, your Honor, a letter from Mr. Claude R. Porter, of the Interstate Commerce Commission, addressed to Mr. Coulson, dated May 2, 1944, relating to various matters concerned in this petition.

The Court: Admitted.

(The document was marked Reorganization Committee's Exhibit 1 in evidence.)

Mr. Smith: If your Honor please, I think I should go through these different points that are

(Testimony of Robert E. Coulson.)

discussed by Mr. Porter and get Mr. Coulson's testimony at greater length on that point. The first point discussed relates to the amount of common stock that is to be paid to the First Mortgage Bondholders. The plan says in one place that there is to be 4.67 of a share of common stock to a thousand dollar bondholder in payment of \$266.66 $\frac{2}{3}$ as accrued interest. And then there is another figure giving the aggregate number of shares of common stock to be issued on this account.

Q. When you multiply them out do they come into accord?

A. They do not. There is a difference owing to the decimal point not being carried out indefinitely, I think.

Q. Our view is a specific statement of the plan which says they are to get 4.67 of a share for each \$1000 bond shall prevail over the statement of the aggregate, and that is your view, Colonel Coulson?

A. That is correct.

Q. And that is the view of the Interstate Commerce Commission.

The second point relates to the claim of the Railroad Credit Corporation. The Railroad Credit Corporation had certain security from the debtor, including the Marshalling and Distributing Plan, and certain other security that we shall discuss here- [110] after, and under the Marshalling and Distributing Plan, as is shown in the testimony, the Railroad Credit Corporation since the effective date of the plan, January 1, 1939, has received \$26,091.72.

(Testimony of Robert E. Coulson.)

The plan says, "Receipts of this kind are to be applied in reduction of the claim of the Railroad Credit Corporation."

Despite that, the Railroad Credit Corporation has made the suggestion that while its claim should be reduced, the amount of securities it gets from the reorganized corporation shall not be reduced.

Is that a statement of——

A. That is correct.

Q. And what is the view of the Reorganization Committee in that regard?

A. The Reorganization Committee had the view that the plan quite clearly contemplated the reduction of the amount of securities to go to the Railroad Credit Corporation on account of any credits which it applied from the Marshalling-Refunding Plan between the effective date and the date of the consummation of the plan.

Mr. Smith: It is that point, your Honor—and I will advert to our exhibit—that the Commission says the language of the plan is ambiguous and the matter should be construed by the court on the basis of the court's views as to the rights of the parties. We have outlined our view, which is the reduction of the amount of the claim of the Railroad Credit Corporation, necessarily involves a reduction of the amount of securities that the Railroad Credit Corporation is to receive. And I assume that in due course Mr. Buckland will express his views in that respect.

Another point relates to this indebtedness of the

(Testimony of Robert E. Coulson.)

Standard Realty & Development Company that was assigned by the Western Pacific Railroad Corporation, the holding company, as collateral [111] security for the indebtedness of the debtor held by the Railroad Credit Corporation, and in that connection the dispute, as we understand it, must be between the Western Pacific Railroad Corporation, a holding company, and the Railroad Credit Corporation, because the question is, Who ought to have that money? Some of it is now in the hands of the Standard Realty & Development Corporation. We do not know to whom to pay it. Some of it has been paid to the Western Pacific Railroad Corporation, the holding company, and some of it has been paid over by the Western Pacific Railroad Corporation to the Railroad Credit Corporation, and, of course, that reduced the amount of the claim of the Railroad Credit Corporation in this reorganization. Nevertheless, we are issuing or we are planning to issue the full amount of securities undiminished by that reduction, and there are conflicting claims between those two people regarding the effect of this indebtedness and the payment of the proceeds of the——

Mr. Sloss: May I interrupt a moment, your Honor? Perhaps to shorten matters. I appear here for the Western Pacific Railroad Corporation, which pledged this Standard Company stock which it owned as additional security to the Railroad Credit Corporation. Our position here is that the disposition of that stock and the proceeds thereof is

(Testimony of Robert E. Coulson.)

not involved in the plan, and is not a matter that is within the jurisdiction of your Honor on this hearing, but should be determined by independent litigation between the two parties involved, namely, the Western Pacific Railroad Corporation and the Railroad Credit Corporation. I would like to be heard on that briefly whenever it is convenient to your Honor during the course of the day.

Mr. Buckland: Just a moment. There has been introduced in evidence a petition of ours, offered here and filed by the Court [112] containing a motion by the Railroad Credit Corporation to dismiss that proceeding, and for summary judgment upon the face of the pleadings in that case, and if these priorities must be disposed of, the time has come perhaps to discuss that. I do not want to interrupt this orderly presentation of the case, here, but obviously a petition in equity between the Western Pacific Railroad Corporation and the Railroad Credit Corporation, which is now in this court, accompanied by a motion to dismiss and a motion for summary judgment on account of the pendency of a prior suit which you are now discussing, is a matter which should be disposed of in chronological order. With that understanding I think perhaps it might be just as well for all of them to go together, because the priority of the matters has been disturbed by having brought to your Honor's notice the situation as it is.

The Court: I notice a complaint has been filed by the Western Pacific Railroad Corporation, and I

(Testimony of Robert E. Coulson.)

thought when I glanced at it that it would be taken up as you suggest and considered with these other matters that are now being presented to the Court.

Mr. Buckland: But instead of answering, I filed a motion to dismiss on account of the pendency of a prior suit.

The Court: If you wish, I can hear argument on that when Mr. Smith has finished, or at any time that will suit your convenience. I presume any of these matters which are now being brought out in evidence would apply to the ruling of the Court on that complaint.

Mr. Buckland: They are all quite pertinent and quite relevant, and if we just bear in mind that the relative priorities of those matters which would have to be disposed of, I think we can go along just as we are.

The Court: All right. [113]

Mr. Smith: Q. There is also the indebtedness of the Sacramento Northern, some \$800,000. None of that has been paid. But those are in the same situation and present the same questions, do they not, Colonel Coulson?

A. From the standpoint of the reorganization there is a substantial difference between the Sacramento Northern problem and the Standard Realty problem. It was the Sacramento Northern which led the Reorganization Committee to decide to bring this matter to the attention of the Court.

The Court: Q. That matter is not in the same

(Testimony of Robert E. Coulson.)

situation as suggested by Judge Sloss, is it? It is not a separate matter?

A. Your Honor, what I have in mind is this: The Sacramento Northern is treated under the plan as part of the Western Pacific system. Its earnings and deficits are in there. However, the Commission plan does not deal with its debt structure. So from the standpoint of consummating the reorganization we have a somewhat anomalous situation, that you revamp the debt structure of the Western Pacific Railroad Company, and the Sacramento Northern, which is an essential part of the system, but separately incorporated, is left with apparently \$800,000 of an unsecured debt in outside hands with no provision for its treatment under the plan, and there is a dispute between the Western Pacific Railroad Corporation and the Railroad Credit Corporation, as to which has the right in it. In some way it should be disposed of at the time of the consummation of the plan, if possible, and so we presented to the Court that issue, which is also brought before the Court in a separate petition, with a view to expediting a determination as to that outside claim against one essential link in the system.

Mr. Smith: Q. That is, as between the Western Pacific Rail- [114] road Company and the Railroad Credit Corporation, issues regarding the Sacramento Northern Railway Company indebtedness may be similar to those regarding the Standard Realty; nevertheless, our interests in getting a determination of those questions is much greater with the Sacramento Northern?

(Testimony of Robert E. Coulson.)

A. Right. That is all I meant by my first answer.

Mr. Smith: It is complicated by the further fact, your Honor, as I say, we think the statute of limitations has run. We do not know whether your Honor will direct the Trustees to plead the statute of limitations, or what your Honor will do about that. It is now in the management of the Trustees, and they are in the control of this Court.

Q. Those are the questions, Mr. Coulson, that Mr. Porter, of the Interstate Commerce Commission, says are questions which may properly be determined by the Court? A. Yes.

Mr. Smith: The next question, your Honor, that we are presenting relates to the status of the Tidewater Southern, with respect to certain provisions of the plan that discuss wholly-owned railroad subsidiaries, and your Honor has heard Mr. Elsey's expression of his view, that despite the fact that a fractional portion of the shares of the Tidewater Southern are still in outside hands, the Tidewater Southern is, to all intents and purposes, still a wholly-owned subsidiary.

Q. In the view of the Committee, Mr. Coulson, should that view of Mr. Elsey's be made effective?

A. Definitely. The Tidewater Southern is treated throughout the plan as a wholly-owned subsidiary, but falls just outside the definition.

Mr. Smith: In that connection, Mr. Porter says that the plan obviously is based upon the inclusion of such subsidiary railway corporations, and it was

(Testimony of Robert E. Coulson.)

by inadvertence only that the words "wholly [115] owned subsidiaries" were used instead of expressly providing in the plan for the inclusion of the Tidewater Southern. So we ask that that plan be corrected in that respect.

And then finally there is a very small question regarding the treatment of debits and credits as to adjust income in prior years. The plan states that, "Available net income shall be ascertained for each such calendar year as the account shall be stated on the books of the line company during said calendar year without adjustments except—" and this is the material matter—"debits or credits to adjust income in prior years shall be treated as income items for the year in which entered on the books, whether cleared through income or profit and loss accounts, so far, but only so far as such debits and credits reflect cash receipts or disbursements in the year in which they are entered on the books."

We ask that that item 3 be changed, so that it reads simply, "Debits or credits to adjust income in prior years shall be treated as income items for the year in which entered on the books, whether cleared through income or profit and loss account."

Q. In the opinion of the Committee would that furnish a more practicable method of accounting?

A. Yes, definitely, both as to tax aspects and general accounting aspects.

Mr. Smith: Q. And that is the question regarding which Mr. Porter says in his letter:

(Testimony of Robert E. Coulson.)

“Division 4 is of the further opinion that the limitation in the adjustment of income items in prior years as provided in clause 3 of the third paragraph of the subdivision L is impracticable and the modification proposed by the Committee represents a proper basis for the correction of the plan by the Court if it sees fit to adopt such proposal.”

That is the matter that we have just been discussing?

A. Yes. [116]

Mr. Smith: Are there any questions?

The Court: Do you wish to ask the witness any questions? Any of the counsel wish to ask the witness any questions? That is all, sir.

Anything further?

Mr. Smith: That is all that we have. I think Mr. Buckland has something he wanted to say, or maybe Judge Sloss wanted to express himself.

The Court: I mean, is there any further evidence that is to be presented?

Mr. Smith: No further evidence on our part. That is our case.

The Court: Any further evidence to be presented to the Court?

Mr. Sloss: My suggestion, your Honor, is, if it is agreeable to Mr. Buckland, that I might present the proposition very briefly that the disposition of the receipts on those claims that have been paid in part by the Standard Company should not be disposed of on the petition of the Reorganization Com-

mittee, but should be disposed of on the separate action. Now, of course, the two things, Mr. Bucklands motion to dismiss that independent action——

The Court: Is that action 23,307-S? Is that the action filed by Mr. Goodrich?

Mr. Sloss: That is the one, yes.

The Court: Filed on May 22nd.

Mr. Sloss: That is the one in which I do not appear for the Western Pacific. My appearance is limited to objecting to the Court's consideration of those issues on this petition of the Reorganization Trustees. The two things are closely involved. One has to come before the other, and I suggest if there is no [117] objection from your Honor or from Mr. Buckland, that I might proceed to state my position briefly.

The Court: Yes.

(Argument of counsel omitted.)

“Mr. Buckland: * * * ”

Therefore, if this court has full jurisdiction as a court of equity in the controversy which apparently exists between the Western Pacific Railroad Corporation and the Railroad Credit Corporation, what is the use of duplicating procedure by bringing a separate action involving the same parties and the same subject matter as is now before your Honor in Western Pacific? And it was for that reason that I told our friends that I would be very glad to accept service in order that this might be expedited, and may I say here we are all at one, I think, with your Honor desiring to expedite this as much as we can. I would accept service, but I reserve the right

to challenge the position of this petition in this court at this time. Under the rule I am given twenty days in which to answer the petition. I did not want twenty days to answer if the petition did not belong here, and therefore I, under the recent rules, or the new rules of the Federal Court, filed a motion in the alternative to dismiss the petition or for a summary judgment.

Now, I base both of those upon the fact that all of the issues of both law and fact which are or can be raised under this separate petition are here before your Honor, and that your Honor will take judicial notice of your own record. I take it that there is no question that your Honor does take judicial notice of your own record.

The Court: There is no question about that.

[118]

(Argument of counsel omitted.)

The Court: With the approval of counsel, I should like to have the reporter transcribe his notes of this hearing and argument. Is there any objection?

Mr. Smith: No objection, your Honor.

Mr. Buckland: I have here a temporary printed brief that I should be glad to give to counsel.

The Court: I was thinking you have had argument enough on it and it won't be necessary to file any briefs unless counsel feel there is something they wish to call the Court's attention to in addition to what has been said today. I understand the petition will be submitted and also the alternative

motion to dismiss, or for summary judgment in case No. 23,307-S is submitted.

Mr. Buckland: May I ask, your Honor, in case it should be necessary to file an answer in this last case, that I be given some time in which to file it?

The Court: Yes. Is that agreeable to everybody interested here? Judge Sloss?

Mr. Sloss: Yes, entirely. I think Mr. Goodrich has another suggestion to make.

Mr. Goodrich: Your Honor, I will make a motion to that effect, if you wish: If the Court concludes that it will take jurisdiction of this bill as an independent bill and not under section 77, and having heard the argument about it, Mr. Buckland was wondering if the Court might then enter judgment on the pleadings filed. I do not see the purpose in holding the court here another day to make another appearance and take the testimony when in fact all the evidence is before the Court.

The Court: If it is agreeable to you, Mr. Buckland, let it be submitted with that understanding.

[119]

Mr. Buckland: I can't see any particular reason——

The Court: It would save time, as suggested by counsel, by Mr. Goodrich, certainly, it would be useless to take up further time of the Court in presenting evidence when all the evidence is before the Court.

Mr. Buckland: I am not quite clear what Mr. Goodrich——

The Court: It would be as if the allegations of the complaint in No. 23,307-S were deemed denied and the case submitted on the evidence offered here today.

Mr. Buckland: I assume here——

Mr. Goodrich: Deny the allegations and submit the matter on the evidence.

The Court: Let it be submitted. I will first, however, pass upon your motion to dismiss and the alternative motion for summary judgment, and then if I should rule against you, it is understood the allegations of the complaint are denied, and I might then pass upon the matter upon its merits.

Mr. Buckland: What I was confused about was that my motion might be considered as an old-fashioned demurrer, and I wish to file an answer if necessary.

The Court: Very well. I will endeavor to give you a decision at an early date.

[Endorsed]: Filed Jun. 26, 1944. [120]

[Title of District Court and Cause.]

No. 26591-S

ORDER CONSTRUING PLAN OF REORGAN-
IZATION IN VARIOUS RESPECTS AND
R E C O N C I L I N G INCONSISTENCIES
THEREIN

The petition filed May 9, 1944, by Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, the Reorganization Committee designated to put into effect and carry out the plan of reorganization of

the debtor above named, for an order construing the plan of reorganization in various respects and reconciling inconsistencies therein came on duly to be heard and was heard June 2, 1944, and has been submitted.

The Court being fully advised in the premises finds [121] that notice of the hearing upon said petition has been given as prescribed by the order of this Court, dated May 9, 1944, and that all of the allegations and representations contained in the petition are true, except that (i) the amount owing by Standard Realty and Development Company to the debtor company for advances on open account is \$303,310.86, (ii) the amount owing by Sacramento Northern Railway to the debtor company for advances on open account is \$4,779,356.42, and (iii) the positions taken by The Railroad Credit Corporation in respect of the various matters referred to in the petition were not only those averred in the petition, but were and are also such as it took on the hearing on the petition as more fully appears from the record of the hearing on said petition. The Court further finds and concludes:

(a) That the inconsistency pointed out in paragraph 3 of the petition should be resolved in the manner proposed by the Reorganization Committee in paragraph 4 of the petition:

(b) That the provisions of subdivisions P and R of the plan of reorganization (quoted in paragraph 5 of the petition), which relate to the application of the proceeds of the distributive shares of the debtor and its subsidiaries under the marshaling and dis-

tributing plan of 1941, require a reduction in the number of shares of common stock allocated to The Railroad Credit Corporation under paragraph 4 of subdivision P by one share for each \$62 of such proceeds received by The Railroad Credit Corporation after December 31, 1938, and prior to the issuance of the new securities under the plan; [122]

(c) That no reduction should be made in the amounts or number of securities or stock allocated to The Railroad Credit Corporation under paragraph 4 of subdivision P of the plan of reorganization by reason of any payments received by The Railroad Credit Corporation after December 31, 1938, in respect of the claims against Standard Realty and Development Company and Sacramento Northern Railway (such claims being accommodation collateral pledged to and with The Railroad Credit Corporation by The Western Pacific Railroad Corporation by an instrument dated March 25, 1933);

(d) That The Railroad Credit Corporation is entitled to receive, in payment of its claim against the debtor, the securities and stock allocated to it under paragraph 4 of subdivision P of the plan of reorganization, except for the reduction in the number of shares of common stock referred to in paragraph (b) above.

(e) That the rights of The Railroad Credit Corporation under its pledge agreement dated March 25, 1933, with The Western Pacific Railroad Corporation will not be affected by the issuance of the new securities to The Railroad Credit Corporation;

and The Railroad Credit Corporation is entitled to proceed against the collateral so pledged to the extent that the actual value of such new securities shall not satisfy its claim;

(f) That the defect and inconsistency pointed out in paragraphs 19 and 20 of the petition should [123] be cured and reconciled in the manner proposed by petitioners in paragraph 20 of the petition; and

(g) That the defect pointed out in paragraph 21 of the petition should be cured in the manner proposed by petitioners in said paragraph.

Now, Therefore, it is hereby Ordered, Adjudged and Decreed:

(1) That paragraph 2 of subdivision P of the plan of reorganization be and hereby is construed as requiring (a) the issuance of 4.67 shares of new common stock (provided for in the plan) in payment of accrued and unpaid interest, to January 1, 1939, of \$266.66 $\frac{2}{3}$ on each \$1,000 principal amount of the debtor's outstanding First Mortgage bonds, and (b) an aggregate issue of 230,184.767 shares of such common stock in respect of the aggregate of accrued and unpaid interest, to January 1, 1939, upon all such bonds outstanding;

(2) That the Reorganization Committee make provision for the issuance of 4.67 shares of new common stock in payment of accrued and unpaid interest to January 1, 1939, of \$266.66 $\frac{2}{3}$ on each \$1,000 principal amount of the debtor's outstanding First Mortgage bonds;

(3) That the provisions of subdivisions P and R of the plan of reorganization, which relate to the application of the proceeds of the distributive shares of the debtor and its subsidiaries under the marshaling and distributing plan of 1931, be and are hereby construed as requiring a reduction in the number of shares of common stock allocated to The Railroad Credit Corporation under paragraph 4 of subdivision P of the plan by one share for each \$62 of such [124] proceeds received by the Railroad Credit Corporation after December 31, 1938, and prior to the issuance of the new securities under the plan;

(4) That except as provided in paragraph (3) of this order, no reduction be made in the amounts or number of securities or stock allocated to The Railroad Credit Corporation under paragraph 4 of subdivision P of the plan or reorganization;

(5) That The Railroad Credit Corporation is entitled to retain the claims against Standard Realty and Development Company and Sacramento Northern Railway pledged to and with The Railroad Credit Corporation by The Western Pacific Railroad Corporation by an instrument dated March 25, 1933, and to apply the proceeds thereof in satisfaction of its claim against the debtor;

(6) That the term "wholly owned railway subsidiaries" in the second paragraph of subdivision L of the plan of reorganization be interpreted to include as one of such subsidiaries of the debtor Tidewater Southern Railway Company, and to include any railway corporation, 95 per cent or more

of the stock of which shall be owned by the reorganized company after the consummation of the reorganization; and

(7) That the provisions of clause (3) of the third paragraph of subdivision I. of the plan of reorganization be and are hereby revised and reworded so that said clause will provide: [125]

“* * * (3) debits or credits to adjust income in prior years shall be treated as income items for the year in which entered on the books, whether cleared through income or profit and loss accounts.”

Dated: September 14, 1944.

A. F. St. SURE

District Judge

Approved as to form.

ARTHUR B. DUNNE

Attorney for The Railroad
Credit Corporation

LEROY R. GOODRICH

Attorney for The Western
Pacific Railroad Company

FELIX T. SMITH

Attorney for Reorganization
Committee

[Endorsed]: Filed Sep. 14, 1944. [126]

[Title of District Court and Cause.]

No. 26591-S

NOTICE OF APPEAL

The Railroad Credit Corporation, a corporation, a creditor of the above named Debtor, and a party respondent in respect of the matters presented by the Petition of Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, the members of the Reorganization Committee in the above [127] entitled matter, filed in the above entitled matter on May 9, 1944, and a party aggrieved by the Order of September 14, 1944, hereinafter referred to, hereby gives notice that it does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the portions of the Order of the above entitled Court made and filed in the above entitled matter on September 14, 1944, being the Order determining the matters presented by the said Petition of May 9, 1944, adverse to this respondent, The Railroad Credit Corporation, and in particular appeals from the portions of said Order next designated:

(a) The finding and the conclusion in the paragraph designated (b), and each and every part thereof, being the paragraph beginning with the words "That the provisions of subdivisions P and R of the plan of reorganization [quoted in Paragraph 5 of the Petition]" and ending with the words "and prior to the issuance of the new securities under the plan;"

(b) The ordering, adjudging and decreeing provisions of said order in the paragraph in said order

designated (3), being the paragraph beginning with the words "That the provisions of subdivisions P and R of the plan of reorganization, which relate to the application of the proceeds", and ending with the words "under the plan";

(c) So much of said Order as provides or indicates (if the Order does so provide or indicate) that any proceeds of any claim against Standard Realty and Development Company or Sacramento Northern Railway, referred to in the Order, reduce the claim of The Railroad Credit Corporation against the above named Debtor. [128]

Dated: October 13, 1944.

EDWARD G. BUCKLAND

WILLIAM J. KANE

ARTHUR B. DUNNE

Attorneys for Appellant The
Railroad Credit Corpora-
tion

Address: 333 Montgomery Street, San Francisco
4, California.

[Endorsed]: Filed Oct. 13, 1944. [129]

[Title of District Court and Cause.]

No. 26591-S

NOTICE OF APPEAL

Notice is hereby given that The Western Pacific Railroad Corporation, a party to the above-entitled action, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Order Construing Plan of Reorganization In Various

Respects and Reconciling Inconsistencies Therein, made and entered on September 14, 1944, and particularly from Paragraph (5) of said Order and Decree, reading as follows:

“(5) That The Railroad Credit Corporation is entitled to retain the claims against Standard Realty and Development Company and Sacramento Northern Railway pledged to and with The Railroad Credit Corporation by an instrument dated March 25, 1933, and to apply the proceeds thereof in satisfaction of its claim against the debtor.”

Dated: This 13th day of October, 1944.

LEROY R. GOODRICH

Attorney for Appellant, The
Western Pacific Railroad
Corporation.

[Endorsed]: Filed Oct. 13, 1944. [130]

Premium Charged for this bond is \$10.00 per annum.

United States Fidelity and Guaranty Company
Baltimore—Maryland

No. \$250.00

District Court of the United States, for the North-
ern District of California, Southern Division

No. 26591-S

In the Matter of

THE WESTERN PACIFIC RAILROAD COM-
PANY,

Debtor.

COST BOND ON APPEAL

Know All Men by These Presents:

That We, The Western Pacific Railroad Corporation, as Principal, and United States Fidelity and Guaranty Company, a corporation, having its principal place of business in the City of Baltimore, State of Maryland, and having a paid up capital stock of not less than Ten Million Dollars, duly incorporated under the laws of the State of Maryland, and having complied with all the requirements of the laws of the State of California and the United States of America respecting corporations, for the purpose of making, guaranteeing and becoming surety on bonds and undertakings, are held and firmly bound unto The Railroad Credit Corporation in the sum of Two Hundred Fifty and 00/100 (\$250.00) Dollars, lawful money of the United States, to be paid to it, its respective

executors, administrators and successors, of which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated this 13th day of October, 1944.

Whereas the Principal, The Western Pacific Railroad Corporation has prosecuted an appeal to the U. S. Circuit Court of Appeals, Ninth Circuit.

Now, therefore, the condition of this obligation is such that if the above named Principal shall prosecute its said appeal to effect and answer all costs, if it fails to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

The undersigned Surety agrees that in case of any breach of any condition hereof, the Court may, upon no less than ten (10) days notice to the undersigned, proceed summarily to ascertain the amount which the undersigned, as Surety, is bound to pay on account of such breach and render judgment against it and award execution therefor not to exceed the sum specified in this Undertaking.

THE WESTERN PACIFIC
RAILROAD CORPORATION

By LEROY R. GOODRICH

Principal

UNITED STATES FIDELITY
AND GUARANTY COM-
PANY

By MILDRED DROST

Attorney-in-fact

State of California,
County of Alameda—ss.

On this 13th day of October in the year of our Lord One Thousand Nine Hundred and forty-four before me, J. C. Laney a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Mildred Drost, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the United States Fidelity and Guaranty Company, and acknowledged to me that she subscribed the name of the United States Fidelity and Guaranty Company, thereto as principal, and her own name as Attorney-in-fact.

In Witness Whereof, I have hereunto set my hand and affixed my official Seal, at my office in the County and State aforesaid, the day and year in this certificate first above written.

(Attorney-in-fact)

[Seal] J. C. LANEY

Notary Public in and for said County of Alameda,
State of California. [131]

[Title of District Court and Cause.]

No. 26591-S

ORDER PERMITTING FILING OF UNDER-
TAKING FOR COSTS ON APPEAL

Good Cause Appearing Therefor, and The Railroad Credit Corporation, a corporation, having on October 13, 1944 filed its Notice of Appeal, from a

portion of the Order herein of September 14, 1944, and having presented to the above entitled Court the Undertaking for Costs on Appeal of the Hartford Accident and [132] Indemnity Company, a corporation duly authorized to transact a general surety business in the State of California, the above entitled Court hereby permits the filing of the Undertaking for Costs on Appeal of the said surety company.

October 14, 1944.

A. F. ST. SURE

United States District Judge

[Endorsed]: Filed Oct. 14, 1944. [133]

Fidelity and Surety Department
Hartford Accident and Indemnity Company
Hartford, Connecticut

In the District Court of the United States for the
Northern District of California, Southern Division

No. 26,591—S

In the Matter of:

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

UNDERTAKING FOR COST ON APPEAL

Whereas, The Railroad Credit Corporation, a corporation, a creditor of the debtor above-named,

has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a certain order rendered against the said creditor in said action in the above entitled court and in favor of other parties in interest in the matter of the reorganization of The Western Pacific Railroad Company, a corporation, debtor, in pursuance of the bankruptcy act, and entered herein on September 14, 1944.

Now, Therefore, in consideration of the premises and of such appeal, the undersigned Hartford Accident and Indemnity Company, a corporation organized and existing under the laws of the State of Connecticut and duly authorized to transact a general surety business in the State of California, does hereby undertake and promise on the part of The Railroad Credit Corporation, a corporation, the Appellant, that said Appellant will pay all damages and costs which may be awarded against them on the appeal, or on a dismissal thereof, not exceeding Two Hundred Fifty and no/100 (\$250.00) Dollars, to which amount it acknowledges itself bound.

It is further stipulated as a part of the foregoing bond that in case of the breach of any condition thereof, the above-named District Court, may upon ten (10) days' notice to the surety above-named, proceed summarily in said proceedings to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against said surety and award execu-

tion therefor, not exceeding, however, the said sum of Two Hundred Fifty and No/100 Dollars (\$250.00).

In Witness Whereof, the said Surety has caused these presents to be executed and its official seal attached by its duly authorized Attorney-in-Fact at San Francisco, California, the 13 day of October, A. D. 1944.

The premium on this bond is \$10.00 per annum.

HARTFORD ACCIDENT AND
INDEMNITY COMPANY

(Seal) By R. A. VAN HORN
Attorney-in-Fact

[Endorsed]: Filed Oct. 14, 1944. [134]

[Title of District Court and Cause.]

No. 26591-S

THE RAILROAD CREDIT CORPORATION'S
DESIGNATION OF RECORD ON APPEAL

On October 13, 1944, The Railroad Credit Corporation appealed to the United States Circuit Court of Appeals for the Ninth Circuit from certain portions of the Order of the above entitled Court made and filed in the above entitled matter on September 14, 1944, being the Order determining the matters [135] presented by the Petition of Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, members of the Reorganization Committee in the above entitled matter, which said

Petition was filed herein on May 9, 1944. Reference is made to the Notice of Appeal of The Railroad Credit Corporation filed in the above entitled matter on October 13, 1944. The Railroad Credit Corporation hereby designates the portions of the records, proceedings and evidence to be contained in the record on its said appeal as follows:

1. All file marks and endorsements upon all papers documents and other matter hereinafter designated.

2. Petition of The Western Pacific Railroad Company, Debtor, filed herein on August 2, 1935 in pursuance of subdivision (a) of Section 77 of the Bankruptcy Act as amended.

3. Order of the above-entitled court approving said petition filed August 2, 1935.

4. Petition for order respecting filing of claims and division of creditors and stockholders into classes filed August 20, 1935.

5. Order dividing claims into classes filed August 20, 1935.

6. Petition for appointment of trustees and order respecting notice of hearing of said petition, filed August 31, 1935.

7. Order appointing trustees, filed September 23, 1935.

8. Order of September 30, 1935, modifying order appointing trustees and opinion and order of the above-entitled court of November 9, 1935 confirming appointment of trustees.

9. Proposed Plan of Reorganization filed by the Debtor February 8, 1936, being Exhibit "1" of

Exhibits introduced at [136] hearings before the Interstate Commerce Commission.

10. Proposed report of the Bureau of Finance of the Interstate Commerce Commission dated August 2, 1937, in the Matter of The Western Pacific Railroad Company Reorganization, Interstate Commerce Commission, Finance Docket No. 10913; the proposed report is endorsed filed August 6, 1937.

11. Report and order of the Interstate Commerce Commission in said matter, Finance Docket No. 10913, dated October 10, 1938. Order of the Interstate Commerce Commission in said Finance Docket No. 10913, dated December 30, 1938 and granting a rehearing.

12. Report and order of the Interstate Commerce Commission in said matter, Finance Docket No. 10913, dated June 21, 1939.

12a. So much of the proceedings on the hearings before the Interstate Commerce Commission as is necessary to show the introduction in evidence on said hearing of the paper designated No. 9 above. A transcript of the proceedings in the above-entitled court sufficient to show that the transcript of the proceedings before and by the Interstate Commerce Commission was filed in the above-entitled court, and that all of the proceedings before and by the Interstate Commerce Commission were made part of the record of the above-entitled matter in the above entitled court. Or in lieu of the foregoing, a statement that the paper designated No. 9 above was introduced upon the hearing before the Interstate Commerce Commis-

sion and that a transcript of the proceedings before and by the Interstate Commerce Commission was filed in the above-entitled court, and made a part of its records herein.

13. Order of the Interstate Commerce Commission in [137] said matter, Finance Docket No. 10913, of September 19, 1939, denying petition for rehearing and modification.

14. Order of the above-entitled court made November 8, 1939, fixing the time within which objections to the Plan of Reorganization and claims for equitable treatment might be filed.

15. Stipulation as to facts not in dispute filed herein on December 20, 1939 and order of the above-entitled court made and filed herein on December 20, 1939, making said stipulation a part of the record.

16. So much of the testimony of Charles Elsey given on the hearing of the above-entitled matter in the above-entitled court on January 22, 1940 as shows the introduction in evidence on said hearing of said stipulation, paper No. 15 designated above, together with the memorandum of corrections thereto, or a statement that said stipulation and memorandum of corrections was introduced in evidence on said hearing, and the said memorandum of corrections.

17. Order of the above-entitled court fixing January 22, 1940 as the date for hearing the parties in interest in respect of Plan of Reorganization of the above-named debtor, providing for notice, etc., filed herein December 21, 1939.

18. Opinion of the above-entitled court dated and filed August 15, 1940, upon approval of the Plan of Reorganization of the above-named debtor.

19. Order of the above-entitled court overruling all objections and approving Plan of Reorganization of the above named debtor, filed August 15, 1940.

20. Notice of entry of order of the above-entitled court overruling objections and approving Plan of Reorganization and [138] affidavit of service of said notice, filed August 22, 1940.

21. Claim of The Railroad Credit Corporation filed herein September 12, 1935, together with all attached exhibits.

22. Mandate of the Supreme Court of the United States to the above-entitled court upon the affirming of the order, judgment and decree of the above-entitled court of August 15, 1940 (No. 19 designated above) and filed and spread upon the minutes of the above-entitled court May 13, 1943 (318 U. S. 448).

23. Petition of Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, members of the Reorganization Committee in the above-entitled matter, for construction of the Plan of Reorganization herein and other relief, filed herein on May 9, 1944.

24. Order fixing time and place for hearing of the petition (designated No. 23 above), notice of hearing, etc., and proof of service of the foregoing.

25. Transcript of proceedings on hearing of said

petition (No. 23 designated above), being the proceedings of Friday, June 2, 1944 (two copies furnished herewith), showing appearances and all proceedings excepting only argument of counsel.

26. Appearance herein of Arthur B. Dunne as attorney for The Railroad Credit Corporation, filed herein June 5, 1944.

27. Corrected memorandum opinion and order of the above-entitled court, construing Plan of Reorganization, made and filed herein June 21, 1944.

28. Order of the above-entitled court construing Plan of Reorganization in various respects and reconciling inconsistencies herein, made and filed herein on September 14, 1944. [139]

29. Notice of entry of said order of September 14, 1944 designated No. 28 above and Clerk's certificate of giving of such notice, or other proof of service.

30. Notice of appeal of The Railroad Credit Corporation, a corporation, from portions of the said order of September 14, 1944, paper designated No. 28 above.

31. Undertaking for costs on appeal made by Hartford Accident and Indemnity Company on behalf of The Railroad Credit Corporation, and filed herein on October 14, 1944, and given on said day by The Railroad Credit Corporation in connection with its said appeal from said order of September 14, 1944, together with the order of the above-entitled court permitting filing of said undertaking for costs on appeal by The Railroad Credit Corporation which said order was made and filed on October 14, 1944.

32. A copy of this designation.

33. A copy of the statement of points on which appellant The Railroad Credit Corporation intends to rely, filed herein with this designation.

34. Various appeals were taken from the order and decree of the above-entitled court of August 15, 1940, approving the Plan of Reorganization and overruling objections to said Plan (No. 19 designated above). In connection with said appeals, there was gotten up and duly certified a transcript of record which said transcript of record was filed in the Circuit Court of Appeals for the Ninth Circuit in the matter entitled and numbered in said court as follows:

In the United States Circuit Court of Appeals
Ninth Circuit [140]

No. 9714

In the Matter of the
WESTERN PACIFIC RAILROAD COMPANY,
a corporation,

Debtor.

WESTERN PACIFIC RAILROAD CORPORA-
TION, a corporation, et al.,

Appellants,

v.

INSTITUTIONAL BONDHOLDERS COMMIT-
TEE, et al.,

Appellees.

Said record on appeal in said matter No. 9714

in the United States Circuit Court of Appeals for the Ninth Circuit contains, duly certified, all of the foregoing matters numbered in this designation numbers 1 to 20, both inclusive, together with further matters bearing upon the issues raised upon said appeal and the papers by which said appeal was taken and perfected. All of said other matters contained in said transcript of record are to be deemed designated by this designation and hereby are designated in the event the said United States Circuit Court of Appeals for the Ninth Circuit shall make the order to be applied for by appellant The Railroad Credit Corporation and next hereinafter referred to.

It is the intention of The Railroad Credit Corporation, in connection with its said appeal herein referred to and the record hereby designated, to petition the Circuit Court of Appeals for the Ninth Circuit for an order substantially as follows: That there be omitted from the transcript of record prepared in pursuance of this designation the matters heretofore certified to the said Circuit Court of Appeals for the Ninth Circuit in the said matter No. 9714 in said Circuit Court of Appeals and the matters numbers 1 through 20, both inclusive [141] above, and that in lieu thereof, in the transcript of record hereby designated, a copy of said order of said Circuit Court of Appeals may be included, and that all matters and things heretofore certified to said Circuit Court of Appeals in said matter No. 9714 may be deemed a part of the

record on appeal hereby designated and even though not herein specifically designated may be referred to by any of the parties and that if the parties desire that such matters be exhibited to the court they may, if they so elect, reproduce them, or some of them, in whole or in part, in the briefs of the parties or in appendices to such briefs.

If said United States Circuit Court of Appeals for the Ninth Circuit shall make an order as last hereinabove referred to and a copy of said order is filed in the above-entitled court in the above-entitled matter, then, such order is hereby designated for inclusion in the transcript of record hereby designated in lieu of the matters numbered 1 to 20, both inclusive, in this designation and in lieu of all other matters heretofore certified to said Circuit Court of Appeals and included in the transcript of record in the matter No. 9714 in said Circuit Court of Appeals.

Dated: November 15th, 1944.

EDWARD G. BUCKLAND

WILLIAM J. KANE

ARTHUR B. DUNNE

Attorneys for The Railroad
Credit Corporation.

[Endorsed]: Filed Nov. 16, 1944. [142]

[Title of District Court and Cause.]

No. 26591-S

STATEMENT OF POINTS ON WHICH AP-
PELLANT THE RAILROAD CREDIT
CORPORATION INTENDS TO RELY

The Railroad Credit Corporation having appealed from the portions of the order of the above-entitled Court of September 14, 1944, adverse to it (being the Order construing the Plan of Reorganization and determining the matters [143] presented by the Petition of May 9, 1944, of Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, members of the Reorganization Committee in the above-entitled matter) all as more particularly appears from the Notice of Appeal of The Railroad Credit Corporation filed herein on October 13, 1944, now states the points on which it intends to rely on said appeal, as follows:

1. The said Order and Decree of September 14, 1944, in the portions appealed from by The Railroad Credit Corporation (particularly (b) of the Findings and Conclusions) is in error in construing the Plan of Reorganization of the above-named debtor (and particularly subdivisions P and R of said Plan of Reorganization) as requiring a reduction in the number of shares of common stock allocated to The Railroad Credit Corporation under paragraph 4 of subdivision P by one share for each \$62 of the proceeds of the distributable shares of the debtor and its subsidiaries under the Marshalling and Distributing Plan of 1931 [erroneously referred to as the Plan of 1941] received by The

Railroad Credit Corporation after December 31, 1938 and prior to the issuance of the new securities under said Plan.

2. The court erred and the said Order and Decree of September 14, 1944 is in error in the portions appealed from by The Railroad Credit Corporation (particularly in paragraph (3) of the ordering, adjudging and decreeing provisions) in construing subdivisions P and R of the Plan of Reorganization of the above-named debtor and in construing them as requiring a reduction in the number of shares of common stock allocated to The Railroad Credit Corporation under paragraph 4 of subdivision P of the said Plan by one share for each \$62 of proceeds of the [144] distributive shares of the said debtor and its subsidiaries under the Marshalling and Distributing Plan of 1931, received by The Railroad Credit Corporation after December 31, 1938, and prior to the issuance of the new securities under the said plan.

The provisions of subdivision R of the said Plan of Reorganization provide that to the extent to which The Railroad Credit Corporation receives any distributive shares of the Debtor or its subsidiaries under the Marshalling and Distributing Plan of 1931, prior to the issuance of the new securities under the Plan, the proceeds shall be applied in reduction of the claim of The Railroad Credit Corporation and in this respect provides in part that such proceeds "shall be applied in reduction of the claim of the Railroad Credit Corporation in respect of which such new securities are to be

issued at the rates provided in subdivision P * * *.” The words “in respect of which such new securities are to be issued at the rates provided in subdivision P * * *” are merely descriptive of the claim referred to and were inserted solely for the purpose of identifying the claim referred to and are not directive in character and do not direct a reduction in the new securities to be received by The Railroad Credit Corporation by reason of the receipt by The Railroad Credit Corporation of any distributive shares of the debtor or any of its subsidiaries under the Marshalling and Distributing Plan of 1931.

3. The Railroad Credit Corporation is entitled to receive and retain the securities allotted to it under paragraph 4 of subdivision P of the Plan of Reorganization of the above-named debtor, unless the market value of the new securities issued to The Railroad Credit Corporation under said Plan at the time of delivery of the same to The Railroad Credit Corporation plus the proceeds [145] realized by The Railroad Credit Corporation from collateral securities held by it other than general and refunding mortgage bonds, exceeds the face amount of the claim of The Railroad Credit Corporation together with accrued interest thereon and to the extent that the market value of said new securities at the time of delivery thereof to The Railroad Credit Corporation, and the collateral security held by The Railroad Credit Corporation other than general and refunding mortgage bonds, falls below the face of the claim of The Railroad

Credit Corporation against the above-named debtor, together with accrued interest thereon.

4. Unless and until the market value of the new securities allotted to The Railroad Credit Corporation under said plan of reorganization of the above-named debtor, shall, at the date of delivery thereof to The Railroad Credit Corporation, equal or exceed the amount of the said claim of The Railroad Credit Corporation, plus interest, The Railroad Credit Corporation may continue to apply in further partial payment of its said claim the proceeds of collateral security held by it, other than general and refunding mortgage bonds, and the proceeds of the pledged distributive shares of the said debtor and its subsidiary under the Marshalling and Distributing Plan of 1931.

5. The new securities allotted to The Railroad Credit Corporation under the said Plan of Reorganization of the above-named debtor were not allotted to The Railroad Credit Corporation upon the basis of its claim against the said debtor, had no relation whatsoever to the amount of said claim and were not allotted because of, or on the basis of or in relation to any security held by The Railroad Credit Corporation, securing its said claim, except general and refunding mortgage bonds, [146] and no new securities were allocated to The Railroad Credit Corporation, under the said Plan of Reorganization, on account of or because of or in relation to its lien on the pledged distributive share of the said debtor and its subsidiary under the

Marshalling and Distributing Plan of 1931, but the securities allotted to The Railroad Credit Corporation under the said Plan of Reorganization of the above-named debtor were allotted solely upon the basis of, on account of, and in relation to the general and refunding mortgage bonds held by The Railroad Credit Corporation as collateral security for its claim (principal and interest) against the above-named debtor.

6. The new securities allocated to The Railroad Credit Corporation under the said Plan of Reorganization of the above-named debtor and to be issued to and received by The Railroad Credit Corporation, operate to affect the claim of The Railroad Credit Corporation (principal and interest) only as between The Railroad Credit Corporation and the above-named debtor and to provide to the above-named debtor (but to no one else) a defense to said claim and operate only to make said claim unenforceable only as between The Railroad Credit Corporation and the above-named debtor, without in any way affecting the rights of The Railroad Credit Corporation, by reason of its said claim, as to other persons and as to collateral security, excepting only general and refunding mortgage bonds held by The Railroad Credit Corporation as collateral security and directed to be surrendered. The said allocation and issuance and receipt of said new securities under said Plan of Reorganization does not satisfy and discharge the claim (principal or interest) of The Railroad Credit Corporation aforesaid and said claim can be dis-

charged and will be discharged and satisfied only by the receipt by The Railroad Credit Corporation of money or [147] money's worth (in fact and as measured by market value) to the full extent of said claim of The Railroad Credit Corporation. The issuance of said new securities to The Railroad Credit Corporation will provide the above-named debtor with a defense to the said claim of The Railroad Credit Corporation, not by reason of the fact that the said claim will be thereby satisfied and discharged, but only because of the provisions of the Federal Bankruptcy Act and particularly §77 thereof. The said claim itself will still remain unsatisfied, except as the same is satisfied to the extent of the market value of the new securities received by The Railroad Credit Corporation, said market value to be taken at the time of receipt thereof, and to the extent that The Railroad Credit Corporation realizes on security held by it and not required to be surrendered. The security held by The Railroad Credit Corporation, not required to be surrendered by it, that is, security other than general and refunding mortgage bonds, and the market value of the said new securities, does not and will not be as much as the amount of the claim of The Railroad Credit Corporation against the above-named debtor and interest. There is no provision in the said Plan of Reorganization in conflict with any of the foregoing propositions.

7. The said Plan of Reorganization does not contemplate or direct the surrender by The Railroad Credit Corporation of any collateral excepting only

collateral as against which new securities are allotted to The Railroad Credit Corporation under said Plan and new securities are allotted to The Railroad Credit Corporation only against general and refunding mortgage bonds held by The Railroad Credit Corporation as collateral. The new securities allotted to The Railroad Credit Corporation [148] under said Plan represent only the equitable equivalent of the collateral to be surrendered by The Railroad Credit Corporation, that is to say, the general and refunding mortgage bonds held by The Railroad Credit Corporation as collateral security.

8. The said Plan of Reorganization properly construed means and was intended to mean what has heretofore been stated in paragraphs 3 and following of the foregoing statement of points.

EDWARD G. BUCKLAND

WILLIAM J. KANE

ARTHUR B. DUNNE

Attorneys for The Railroad
Credit Corporation.

(Affidavit of service by mail attached.)

[Endorsed]: Filed Nov. 16, 1944. [149]

[Title of District Court and Cause.]

No. 26591-S

THE WESTERN PACIFIC RAILROAD CORPORATION'S DESIGNATION OF RECORD ON APPEAL

On October 13, 1944, The Western Pacific Railroad Corporation appealed to the United States Circuit Court of Appeals for the Ninth Circuit from certain portions of the Order of the above entitled Court made and filed in the above entitled matter on September 14, 1944, being the Order determining the matters presented by the Petition of Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, members of the Reorganization Committee in the above entitled matter, which said Petition was filed herein [153] on May 9, 1944. Reference is made to the Notice of Appeal of The Western Pacific Railroad Corporation filed in the above entitled matter on October 13, 1944. The Western Pacific Railroad Corporation hereby designates the portions of the records, proceedings and evidence to be contained in the record on its appeal as follows:

1. All of items 1 to 25, both inclusive, and each of such items, as the same are set forth in the Designation of Record on Appeal filed in the above entitled matter by The Railroad Credit Corporation, each of which items the Western Pacific Railroad Corporation incorporates by reference herein.

2. All of items 27 to 29, both inclusive, and all of item 34, and each of said items, as the same are set forth in the Designation of Record on Appeal filed in the above entitled matter by The Railroad

Credit Corporation, each of which items The Western Pacific Railroad Corporation incorporates by reference herein.

3. Notice of Appeal of The Western Pacific Railroad Corporation, a corporation, from portions of the said order of September 14, 1944, which said Notice of Appeal was filed October 13, 1944.

4. Bond for costs on appeal, made by United States Fidelity and Guaranty Company on behalf of The Western Pacific Railroad Corporation, and filed herein on October 13, 1944 by The Western Pacific Railroad Corporation in connection with its said appeal.

5. A copy of this designation.

6. A copy of the statement of points on which appellant The Western Pacific Railroad Corporation intends to rely, filed herein and with this designation.

7. It is the intention of The Western Pacific Railroad Corporation to join with The Railroad Credit Corporation in the [154] petition to the Circuit Court of Appeals for an order substantially as set forth in Item 34 of the Designation of Record filed by The Railroad Credit Corporation, and adopted and incorporated herein by reference, under Item 2 of this designation.

If said United States Circuit Court of Appeals shall make such order and a copy of said order is filed in the above entitled court in the above entitled matter, then such order is hereby designated for inclusion in the transcript of record hereby designated.

Dated: This 15th day of November, 1944.

LEROY R. GOODRICH

Attorney for The Western
Pacific Railroad Corp.

[Endorsed]: Filed Nov. 18, 1944. [155]

[Title of District Court and Cause.]

No. 26591-S

STATEMENT OF POINTS UPON WHICH AP-
PELLANT, THE WESTERN PACIFIC
RAILROAD CORPORATION, WILL RELY

The Western Pacific Railroad Corporation, which has heretofore appealed to the United States Circuit Court of Appeals for the Ninth Circuit from certain portions of the Order of the above mentioned court, made September 14, 1944, Construing Plan of Reorganization in Various Respects and Reconciling Inconsistencies Therein, hereby makes the following statement of points upon which it will rely upon its appeal: [156]

1. That the District Court erred in that portion of the Order of September 14, 1944 appealed from by The Western Pacific Railroad Corporation (particularly paragraph (c) of the Findings and Conclusions upon which said Order is based) in holding that the rights of The Railroad Credit Corporation under its pledge agreement with The Western Pacific Railroad Corporation will not be affected by the issuance of the new securities to The Railroad Credit Corporation.

2. That the District Court erred in that portion

of its Order of September 14, 1944 appealed from by The Western Pacific Railroad Corporation (particularly paragraph (e) of the Findings and Conclusions upon which said Order is based) in holding that The Railroad Credit Corporation is entitled to proceed against the collateral pledged, under its pledge agreement with The Western Pacific Railroad Corporation dated March 25, 1933, to the extent that the actual or market value of the new securities to be issued to The Railroad Credit Corporation shall not satisfy its claim.

3. That the District Court erred in said Order of September 14, 1944, appealed from by The Western Pacific Railroad Corporation (and particularly in paragraph (5) of said Order) in adjudging and decreeing that The Railroad Credit Corporation is entitled to retain the claims against Standard Realty and Development Company and Sacramento Northern Railway pledged to and with The Railroad Credit Corporation by The Western Pacific Railroad Corporation by an instrument dated March 5, 1933, and to apply the proceeds thereof in satisfaction of its claim against the debtor.

4. That no provision was made in the Plan of Reorganization as certified by the Interstate Commerce Commission and as affirmed by the Supreme Court of the United States, affecting the collateral assigned on March 5, 1933 by The Western Pacific Railroad Corporation. The claims against The Standard Realty and Development Company, and Sacramento Northern Railway were the [157] property of The Western Pacific Railroad Corporation.

They were not loaned to the debtor, The Western Pacific Railroad Company. They at no time constituted any part of the assets of the debtor. It was not within the jurisdiction of the Interstate Commerce Commission to provide for the disposition of the said claims, as between The Railroad Credit Corporation and The Western Pacific Railroad Corporation, upon final consummation of the Plan. The Commission specifically declined to make any such provision. The position it took was confirmed by the judgment of the Supreme Court.

The District Court was in error, in taking jurisdiction of this question, under the Petition of the Reorganization Committee, filed May 9, 1944, and in dismissing the action brought independently by The Western Pacific Railroad Corporation, in a bill numbered 23307-S in said District Court.

5. The District Court erred in its interpretation of the Plan of Reorganization of the debtor company, as such interpretation appears in its Order of September 14, 1944 in that the Court assumes that the value of the new securities to be issued under said Plan is to be measured, not by the values fixed thereon by the Commission, but by the market values of such securities, and that such securities, when issued to the various creditors entitled thereto under the provisions of the Plan, are not to be accepted by said creditors, including The Railroad Credit Corporation, in satisfaction of their claims, and at the values fixed by the Commission on said securities. The Plan provides no other basis of value, upon which such securities are to be issued

or taken. The adoption of market values as distinguished from the values fixed by the Commission would destroy the fairness and validity of the allocation of such securities to all the classes of creditors entitled to receive them, as such allocation was made by the Plan, and affirmed by the Supreme Court.

LEROY R. GOODRICH

Attorney for The Western
Pacific Railroad Corp.

(Affidavit of Service by Mail Attached.)

[Endorsed]: Filed Nov. 18, 1944. [158]

In the United States Circuit Court of Appeals,
Ninth Circuit

No.

In the Matter of an Application for an order to shorten the record on appeals from an order and degree of the United States District Court for the Northern District of California, Southern Division, made and entered on September 14, 1944, in that certain matter in reorganization under the provisions of Section 77 of the Bankruptcy Act entitled and numbered in said United States District Court, "In the Matter of The Western Pacific Railroad Company, Debtor," No. 26591-S.

ORDER PERMITTING SHORTENING OF
RECORD ON APPEAL

1. The following facts have been made to appear to the court by the verified petition of The Railroad

Credit Corporation, a corporation, and The Western Pacific Railroad Corporation, a corporation, Appellants, from the order and decree of September 14, 1944 hereinafter referred to:

On September 14, 1944 the United States District Court for the Northern District of California; Southern Division made and filed an order and decree in that certain matter in reorganization under the provisions of Section 77 of the Bankruptcy Act, pending in said court and entitled and numbered in said court, "In the Matter of The Western Pacific Railroad Company, Debtor," No. 26591-S. The Railroad Credit [163] Corporation and The Western Pacific Railroad Corporation have filed in said United States District Court notices of appeal from portions of said order and decree of September 14, 1944 and in connection with their said appeals have filed in said United States District Court and made their respective designations of record on appeal. In and by said designations there have been designated for inclusion in the transcript of record on appeal from said order and decree of September 14, 1944 certain matters heretofore certified to this court and filed in the records of this court, in a certain matter on appeal to this court entitled and numbered on the files of this court, "In the Matter of The Western Pacific Railroad Company, Debtor, Western Pacific Railroad Corporation, a corporation, et al., Appellants, v. Institutional Bondholders Committee, et al., Appellees," No. 9714 and particularly the items specifically designated 2 to 20, both inclusive in "The Railroad Credit Corporation's Designation

of Record on Appeal” and generally designated in item 34 of “The Railroad Credit Corporation’s Designation of Record on Appeal.”

2. And now, on consideration of the foregoing matters and good cause appearing therefor, it is Ordered:

(a) In preparing the transcript of record on the appeals of The Railroad Credit Corporation and The Western Pacific Railroad Corporation from the order and decree of the said United States District Court made and filed in the said matter No. 26591-S in said court on September 14, 1944, there [164] shall be eliminated items 2 to 20, both inclusive, specified in “The Railroad Credit Corporation’s Designation of Record on Appeal” and in lieu thereof the same items heretofore certified to this court and included in the transcript of record on appeal in this court in the said matter No. 9714 in this court shall be deemed part of the transcript of record on said appeals from said order and decree of September 14, 1944.

(b) In addition, there shall further be eliminated from the transcript of record on the said appeals from said order and decree of September 14, 1944 all other matter heretofore certified to this court and filed in this court in the said matter in this court No. 9714, but all of said matter heretofore included in the transcript of record on appeal in said matter No. 9714 shall be deemed a part of the transcript of record on the said appeals from said order and decree of September 14, 1944.

(c) The Railroad Credit Corporation and The Western Pacific Railroad Corporation shall file in the United States District Court for the Northern District of California, Southern Division in the said matter No. 26591-S in said court a certified copy of this order and the clerk of said United States District Court in preparing and certifying the transcript of record on said appeals from said order and decree of September 14, 1944 shall include in said transcript of record a copy of this order and when so included, the copy of this order shall stand in the place and stead of the matter directed by parts 2(a) and 2(b) [165] of this order to be eliminated from said transcript on appeal.

(d) Upon the said appeals of The Railroad Credit Corporation and The Western Pacific Railroad Corporation any of the parties may refer to any matter heretofore certified to and filed with this court in the transcript of record on appeal in said matter No. 9714 in this court, or, if they deem it desirable, may reproduce any of said matter in their briefs or appendices to their briefs, as matter included in the transcript on appeal on said appeals from said order of September 14, 1944 in the same manner and with the same effect as though the matters contained in the transcript of record on appeal in said matter No. 9714 in this court were physically contained in and were physically a part of the transcript of record on said appeals from said order and decree of September 14, 1944.

Dated : Nov. 21, 1944.

FRANCIS A. GARRECHT

United States Circuit Judge.

[Endorsed]: Filed Nov. 21, 1944. [166]

In the District Court of the United States for the
Northern District of California, Southern
Division

No. 26,591-S

In the Matter of

THE WESTERN PACIFIC RAILROAD
COMPANY,

Debtor.

ORDER EXTENDING TIME WITHIN WHICH
TO FILE RECORD ON APPEAL AND TO
DOCKET ACTION IN CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT

On September 14, 1944, this Court made and entered in the above entitled action its Order Construing the Plan of Reorganization in Various Respects and Reconciling Inconsistencies therein. The Railroad Credit Corporation, a party to [167] the above entitled action, on October 13, 1944, filed its Notice of Appeal from certain portions of the above Order. From this Order The Western Pacific Railroad Corporation also filed a Notice of Appeal on October 13, 1944. Due to the extensiveness of the Matters to be contained in the Transcript of Record on Appeal it is desired that additional time be granted

by this Court for the filing of the Record on Appeal and for the docketing of the action.

Good Cause Appearing Therefor, It Is Hereby Ordered that appellant The Railroad Credit Corporation may have to and including December 26, 1944, within which to file the Record on Appeal and to docket the action in the Circuit Court of Appeals for the Ninth Circuit.

And It Is Further Ordered that the Clerk of the District Court shall include a copy of this Order in the Record on Appeal in the above entitled matter.

Dated: November 22, 1944.

A. F. ST. SURE,

United States District Judge.

[Endorsed]: Filed Nov. 22, 1944. [168]

[Title of District Court and Cause.]

No. 26591-S

ORDER EXTENDING TIME WITHIN WHICH
THE WESTERN PACIFIC RAILROAD
CORPORATION MAY FILE RECORD ON
APPEAL AND TO DOCKET ACTION IN
CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT

On September 14, 1944, this Court made and entered in the above entitled action its Order Construing the Plan of Reorganization in Various Respects and Reconciling Inconsistencies [169] Therein. The Western Pacific Railroad Corpora-

tion, a party to the above entitled action, on October 13, 1944, filed its Notice of Appeal from certain portions of the above Order. From this Order The Railroad Credit Corporation also filed a Notice of Appeal on October 13, 1944. Due to the extensiveness of the matters to be contained in the Transcript of Record on Appeal it is desired that additional time be granted by this Court for the filing of the Record on Appeal and for the docketing of the action.

Good Cause Appearing Therefor, It Is Hereby Ordered that appellant The Western Pacific Railroad Corporation may have to and including December 26, 1944, within which to file the Record on Appeal and to docket the action in the Circuit Court of Appeals for the Ninth Circuit.

And It Is Further Ordered that the Clerk of the District Court shall include a copy of this Order in the Record on Appeal in the above entitled matter.

Dated: November 22, 1944.

A. F. ST. SURE,

United States District Judge.

[Endorsed]: Filed Nov. 22, 1944. [170]

In the District Court of the United States, for the
Northern District of California, Southern
Division

No. 26,591-S

In the Matter of

THE WESTERN PACIFIC RAILROAD
COMPANY,

Debtor.

CERTIFIED COPY OF STIPULATION FILED
IN THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT, AND ORDER ON SAID STIPU-
LATION, IN RESPECT OF RECORD ON
APPEAL [171]

In the United States Circuit Court of Appeals,
Ninth Circuit

In the matter of certain appeals in the following
actions now pending in the United States Dis-
trict Court for the Northern District of Cali-
fornia, Southern Division: "In the Matter of
The Western Pacific Railroad Company,
debtor," Action No. 26591-S, and "The West-
ern Pacific Railroad Corporation v. The Rail-
road Credit Corporation," Action No. 23307-S

STIPULATION FOR AN ORDER TO
SHORTEN THE RECORDS ON APPEAL
AND TO CONSOLIDATE APPEALS FOR
BRIEFING, FOR ORAL ARGUMENT
AND FOR USE OF THE RECORD

I.

There is now pending in the United States Dis-

trict Court for the Northern District of California, Southern Division, an action #26591-S, entitled, "In the matter of The Western Pacific Railroad Company, debtor", a proceeding for reorganization of said railroad company under Section #77 of the Federal Bankruptcy Act. In said action The Railroad Credit Corporation and The Western Pacific Railroad Corporation appeared as creditors of the debtor. On May 9, 1944 the Reorganization Committee filed a petition asking the District Court to construe the Plan of Reorganization of the debtor. A hearing upon said petition was had on June 2, 1944 in the District Court.

On September 14, 1944 the District Court made an order in said proceeding, construing the Plan of Reorganization then before said court.

From said Order of the District Court, The Railroad Credit Corporation and The Western Pacific Railroad Corporation have filed separate appeals. Each of said appellants has filed [172] its designation of record on said appeals.

II.

There is now pending in the said District Court an action #23307-S, entitled, "The Western Pacific Railroad Corporation, plaintiff, vs. The Railroad Credit Corporation, defendant." By stipulation of plaintiff and defendant the hearing of said action, and of a motion by defendant for dismissal thereof, was heard by the District Court on June 2, 1944, and in the same proceeding and upon the same showing, evidence and record, except as to plead-

ings as the hearing of the aforesaid Petition of the Reorganization Committee in action #26591-S. On June 19, 1944 the District Court made an order dismissing said action #23307-S. On August 7, 1944 said District Court filed a judgment therein for defendant.

From this order and from said judgment, The Western Pacific Railroad Corporation has appealed and has filed its designation of record on appeal.

III.

It is the desire of both parties to avoid unnecessary duplication of the record in these several appeals, to save expense and labor and the time of the court, in the printing and reading of briefs and in the hearing of oral argument in connection therewith.

It Is Therefore Hereby Stipulated by The Railroad Credit Corporation and by The Western Pacific Railroad Corporation that an Order be made by the Circuit Court of Appeals for the Ninth Circuit, as follows:

(a) That the appeals separately filed by The Railroad Credit Corporation and The Western Pacific Railroad Corporation, on October 13, 1944, in the proceeding entitled "In the Matter of The Western Pacific Railroad Company, debtor." #26591-S, and the [173] appeal filed by The Western Pacific Railroad Corporation on September 18, 1944 in the proceeding entitled, "The Western Pacific Railroad Corporation, plaintiff, vs. The Railroad Credit Corporation, defendant," #23307-S be

consolidated for briefing and for oral argument, and may be heard upon the same record.

(b) That since the action entitled "The Western Pacific Railroad Corporation vs. The Railroad Credit Corporation," #23307-S, was determined upon the same evidence and record, except as to pleadings, and in the same hearing, as the Reorganization matter, action #26591-S, there need not be repeated and included in the transcript of record on appeal by The Western Pacific Railroad Corporation in said plenary action #23307-S any item or part of the record on appeal which may be included in the records on appeal in action #26591-S.

(c) That the transcript of proceedings in the District Court on June 2, 1944, and other matters of record set forth and designated in the record on appeal in either of said actions, may be used or referred to by either The Railroad Credit Corporation or The Western Pacific Railroad Corporation in their briefs, or appendices thereto, or reproduced therein, as matter included in the transcript on appeal in respect to each of the appeals hereby consolidated.

(d) That The Railroad Credit Corporation and The Western Pacific Railroad Corporation shall file a certified copy of this stipulation and of said order in the United States District Court for the Northern District of California, Southern Division, in the said matter #26591-S, and in the said matter #23307-S, and that the Clerk of said District Court shall include in the transcript of record in each of

said actions a copy of this order, in preparing and certifying the same.

Dated: November 27, 1944.

THE RAILROAD CREDIT
CORPORATION

By ARTHUR B. DUNNE

Its Attorney

THE WESTERN PACIFIC
RAILROAD CORPORATION

By LEROY R. GOODRICH

Its Attorney [174]

ORDER TO CONSOLIDATE APPEALS AND
TO SHORTEN RECORD

The foregoing Stipulation having been read and approved, and

Good cause appearing therefor,

It Is so Ordered.

CURTIS D. WILBUR

United States Circuit Judge

A True Copy.

[Endorsed]: Filed Nov. 28, 1944. Paul P.
O'Brien, Clerk.

[Endorsed]: Filed Nov. 29, 1944. [175]

[Title of District Court and Cause.]

No. 26591-S

ORDER EXTENDING TIME WITHIN WHICH
THE RAILROAD CREDIT CORPORATION
AND THE WESTERN PACIFIC RAIL-
ROAD CORPORATION MAY FILE REC-
ORD ON APPEAL AND TO DOCKET AC-
TION IN THE CIRCUIT COURT OF AP-
PEALS FOR THE NINTH CIRCUIT.

On October 13, 1944, The Railroad Credit Corporation and The Western Pacific Railroad Corporation, parties to the above entitled action, filed notices of appeal from certain portions of [176] the Order Construing the Plan of Reorganization in Various Respects in Reconciling Inconsistencies Therein, made and entered by this Court in the above entitled action on September 14, 1944. This Court did on November 22, 1944 grant an extension of thirty-four (34) days to and including December 26, 1944, for the filing of the record on appeal and for the docketing of the action by the above named appellants. Due to the extensiveness of the matters to be contained in the transcript, the Clerk of the District Court is unable to prepare the transcript of the record on appeal within the additional allotted time, and it is desired that an additional time of sixteen (16) days to and including January 11, 1945 be granted by this Court in accordance with Rule 73(g) of the Federal Rules of Civil Procedure for the filing of the record on appeal and for the docketing of the action in the Circuit Court.

Good Cause Appearing Therefor, It is Hereby Ordered that the appellants, The Railroad Credit Corporation and The Western Pacific Railroad Corporation, may have to and including January 11, 1945 within which to file the record on appeal and to docket said action in the Circuit Court of Appeals, Ninth Circuit.

It Is Further Ordered that the Clerk of the District Court shall include a copy of this Order in the Record on Appeal in the above entitled matter.

Dated: December 21, 1944.

A. F. ST. SURE

United States District Judge

[Endorsed]: Filed Dec. 21, 1944.

[Title of District Court and Cause.]

No. 26591-S

AMENDMENT AND SUPPLEMENT TO DESIGNATION OF RECORD ON APPEAL OF THE RAILROAD CREDIT CORPORATION

The Railroad Credit Corporation's Designation of Record on Appeal, filed herein on November 16, 1944, is amended and supplemented as follows:

Also include in the record on appeal the affidavit

[178]

of Helen Small filed herein on November 16, 1944, and showing service by mail of the Statement of Points and the Designation of Record on Appeal

of The Railroad Credit Corporation; and copy of this Amendment and Supplement to Designation.

Attached to said affidavit were copies of said Statement of Points and said Designation of Record on Appeal. This need not be repeated, but there may be substituted for it the following statement:

Attached to the original of the foregoing Affidavit of Service by Mail as the same was filed were copies of the Statement of Points and Designation of Record referred to in said Affidavit, which are not herein repeated because they appear elsewhere in this Transcript.

Dated: January 4, 1945.

EDWARD G. BUCKLAND

WILLIAM J. KANE

ARTHUR B. DUNNE

Attorneys for The Railroad
Credit Corporation.

[Endorsed]: Filed Jan. 4, 1945.

[Title of District Court and Cause.]

No. 26591-S

AMENDMENT AND SUPPLEMENT TO DESIGNATION OF RECORD ON APPEAL OF THE WESTERN PACIFIC RAILROAD CORPORATION

The Western Pacific Railroad Corporation's Designation of Record on Appeal, filed herein on November 18, 1944, is amended and supplemented as follows:

Also include in the record on appeal the affidavit of T. O. Laine filed herein on November 20, 1944 showing service by mail of the Statement of Points and the Designation of Record on Appeal of The Western Pacific Railroad Corporation. Attached to said affidavit were copies of said Statement of Points and said [180] Designation of Record on Appeal. These copies need not be repeated, but there may be substituted therefor the following statement:

"Attached to the original of the foregoing affidavit of service by mail, as the same was filed, were copies of the Statement of Points and Designation of Record referred to in said affidavit which are not herein repeated because they appear elsewhere in this Transcript."

Also include in the record on appeal a copy of this Amendment and Supplement to Designation.

Dated: This 5th day of January, 1945.

LEROY R. GOODRICH

Attorney for The Western Pa-
cific Railroad Corporation.

[Endorsed]: Filed Jan. 6 1945. [181]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 181 pages, numbered from 1 to 181, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of The Western Pacific Railroad Company, Debtor, No. 26591-S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Twenty-seven & 75/100 Dollars and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 9th day of January A. D. 1945.

[Seal]

C. W. CALBREATH

Clerk

E. H. NORMAN

Deputy Clerk [182]

[Endorsed]: No. 10962 United States Circuit Court of Appeals for the Ninth Circuit. The Railroad Credit Corporation, a corporation, Appellant, vs. Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, the members of the Reorganization Committee, of the Western Pacific Railroad Co., Debtor, Appellees, and The Western Pacific Railroad Corporation, a corporation, Appellant vs. The Railroad Credit Corporation, a corporation, Appellee. Transcript of Record. Upon Appeals from the District Court of the United States for the Northern District of California Southern Division.

Filed January 10, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals in
and for the Ninth Circuit

No. 16962

In The Matter of

THE WESTERN PACIFIC RAILROAD COM-
PANY,

Debtor.

TWO APPEALS:

THE RAILROAD CREDIT CORPORATION, a
corporation,

Appellant,

vs.

FREDERICK H. ECKER, et al., etc.,

Appellees.

THE WESTERN PACIFIC RAILROAD COR-
PORATION, a corporation,

Appellant,

vs.

THE RAILROAD CREDIT CORPORATION, a
corporation,

Appellee.

STATEMENT OF POINTS ON WHICH THE
RAILROAD CREDIT CORPORATION IN-
TENDS TO RELY, AND DESIGNATION
OF PORTIONS OF RECORD TO BE RE-

LIED UPON AND APPLICATION FOR
ORDER IN RESPECT OF PRINTING
RECORD.

The Railroad Credit Corporation having on October 13, 1944 appealed from certain portions of the Order of the District Court of the United States, Northern District, Southern Division, made and filed on September 14, 1944, in the matter entitled and numbered in said court "In the Matter of The Western Pacific Railroad Company, Debtor," Bankruptcy No. 26591, (being the Order Construing the Plan of Reorganization in Various Respects and Reconciling Inconsistencies Therein) did on the 15th day of November, 1944, serve upon all adverse parties by mail a true and correct copy of the "Statement of Points on Which Appellant, The Railroad Credit Corporation Intends to Rely", and a true and correct copy of "The Railroad Credit Corporation's Designation of Record on Appeal", the originals of which papers were filed in the District Court on the 16th day of November, 1944, together with an "Affidavit of Service by Mail", copies of which documents are included in the original certified record on appeal in the above entitled matter and which appear therein at the following pages:

Statement of Points on Which Appellant, The Railroad Credit Corporation Intends to Rely—Page 143—Original Certified Record.

The Railroad Credit Corporation's Designation of Record on Appeal—Page 135—Original Certified Record.

Affidavit of Service by Mail—Page 150—Original Certified Record.

The Railroad Credit Corporation hereby states that on this appeal it intends to rely on those points set out and designated in the above "Statement of Points on Which Appellant, The Railroad Credit Corporation Intends to Rely."

The Railroad Credit Corporation further states that those documents designated in the above "The Railroad Credit Corporation's Designation of Record on Appeal" are necessary for the consideration by the court on this appeal.

Certain of the documents so designated were heretofore certified to the above entitled court in that certain matter in the above entitled court entitled and numbered in said court "In the Matter of The Western Pacific Railroad Company, Debtor,—Western Pacific Railroad Corporation, a corporation, et al, Appellants, vs. Institutional Bondholders Committee et al, Appellees," No. 9714. Heretofore and on November 21, 1944, the above entitled court, on the application of appellants in this matter, The Railroad Credit Corporation and The Western Pacific Railroad Corporation, made and filed its Order, in connection with the present appeals, authorizing the elimination from the original certified record on these appeals of all matters heretofore certified to this court and contained in the records of this court in the said matter in this court No. 9714, upon the inclusion in the original certified record

on these appeals of a copy of said order of this court of November 21, 1944, contained in the original certified record on these appeals at page 163 thereof, and, accordingly, matters contained in the record in the said matter in this court No 9714 have been eliminated from the original certified record on these appeals, and appellant, The Railroad Credit Corporation, prays that the said matters so included in the original certified record on these appeals by reference, but physically excluded in pursuance of said order of November 21, 1944 and contained in the record in the said matter in this court numbered 9714 be not printed, and that this court make its order accordingly, and that in said order this court grant leave to the parties to make reference, or reproduce in their briefs, parts of the matter contained in the record in this court in the said matter in this court numbered 9714 in the same way and with the same effect as though the said matters were printed as part of the record on these appeals.

Dated: January 10, 1945.

EDWARD G. BUCKLAND

WILLIAM J. KANE

ARTHUR B. DUNNE

Attorneys for The Railroad
Credit Corporation

[Endorsed]: Filed, Jan. 10, 1945. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

No. 10962

ORDER IN RESPECT OF PRINTING OF
RECORD

Good Cause Appearing Therefor, It Is Ordered that in printing the record on appeals in the above entitled matter it shall be necessary to print only the matter physically contained in the original certified record as certified to this court by the Clerk of the United States District Court for the Northern District of California, Southern Division, and it shall not be necessary to print any matter therein contained by reference by reason of the order of this court of November 21, 1944, a copy of which appears in said original certified copy of record, and

It Is Further Ordered that on this appeal any of the parties may refer to or reproduce in their brief or as appendices thereto any matter appearing in the record on appeal in this court in the matter in this court numbered 9714, and by reference incorporated in the record on these appeals.

Dated: January 10, 1945.

FRANCIS A. GARRECHT

United States Circuit Judge

[Endorsed]: Filed Jan. 11, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

No. 10962

STATEMENT OF POINTS ON WHICH THE
WESTERN PACIFIC RAILROAD CORPO-
RATION INTENDS TO RELY, AND DES-
IGNATION OF PORTIONS OF RECORD
TO BE RELIED UPON

The Western Pacific Railroad Corporation having on October 13, 1944 appealed from certain portions of the Order of the District Court of the United States, Northern District, Southern Division, made and filed on September 14, 1944, in the matter entitled and numbered in said court "In the Matter of The Western Pacific Railroad Company, Debtor," Bankruptcy No. 26591, (being the Order Construing the Plan of Reorganization in Various Respects and Reconciling Inconsistencies Therein) did on the 18th day of November, 1944, serve upon all adverse parties by mail a true and correct copy of the "Statement of Points on Which Appellant, The Western Pacific Railroad Corporation Intends to Rely", and a true and correct copy of "The Western Pacific Railroad Corporation's Designation of Record on Appeal", the originals of which papers were filed in the District Court on the 18th day of November, 1944, and were followed by an "Affidavit of Service by Mail", filed on the 20th day of November, 1944, copies of which documents are included in the original certified record on appeal in the above entitled matter and which appear therein at the following pages:

Statement of Points on Which Appellant, The Western Pacific Railroad Corporation Intends to Rely—Page 158—Original Certified Record.

The Western Pacific Railroad Corporation's Designation of Record on Appeal—Page 153—Original Certified Record.

Affidavit of Service by Mail—Page 159—Original Certified Record.

The Western Pacific Railroad Corporation hereby states that on this appeal it intends to rely on those points set out and designated in the above "Statement of Points on Which Appellant, The Western Pacific Railroad Corporation Intends to Rely".

The Western Pacific Railroad Corporation further states that those documents designated in the above "The Western Pacific Railroad Corporation's Designation of Record on Appeal" are necessary for the consideration by the court on this appeal.

Dated: This 12th day of January, 1945.

LEROY R. GOODRICH

Attorney for The Western
Pacific Railroad Corpora-
tion.

[Endorsed]: Filed Jan. 12, 1945. Paul P.
O'Brien, Clerk.

No. 10966

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE WESTERN PACIFIC RAILROAD COR-
PORATION,

Appellant,

VS.

THE RAILROAD CREDIT CORPORATION,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

APR 2 - 1945

PAUL P. O'BRIEN,
CLERK

No. 10966

United States
Circuit Court of Appeals

For the Ninth Circuit.

THE WESTERN PACIFIC RAILROAD COR-
PORATION,

Appellant,

vs.

THE RAILROAD CREDIT CORPORATION,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Attorneys for Appellee

In the District Court of the United States
For the Northern District of California
Southern Division

No. 23307-S

THE WESTERN PACIFIC RAILROAD COR-
PORATION,

Plaintiff,

vs.

THE RAILROAD CREDIT CORPORATION,
Defendant.

BILL OF COMPLAINT

The Western Pacific Railroad Corporation, plaintiff herein, complaining of the above named defendant, The Railroad Credit Corporation, respectfully shows:

I.

That the plaintiff, as is also the defendant, is a domestic corporation created by and existing under the laws of the State of Delaware.

II.

That this is a civil action in equity arising under the Constitution and laws of the United States of America and the amount in controversy exclusive of interest and costs exceeds the sum of [1*] \$50,000.00.

III.

That on or about March 25, 1933, as evidenced by an instrument in writing dated as of said date, the

*Page numbering appearing at foot of page of original certified Transcript of Record.

plaintiff assigned to the defendant, as accommodation collateral for certain notes of The Western Pacific Railroad Company, in addition to collateral owned by and pledged thereunder by said last Company, the following indebtedness due the plaintiff, viz:

(a) \$110,000 due the plaintiff from and by Standard Realty and Development Company secured by a mortgage on certain real property in the State of California;

(b) \$856,260 due the plaintiff from and by Sacramento Northern Railway, together with accrued unpaid interest from November 1, 1931.

IV.

That on or about August 2, 1935, said The Western Pacific Railroad Company filed a petition in the District Court of the United States for the Northern District of California, Southern Division, stating, among other things, that it was unable to meet its debts as they matured, and that it desired to effect a Plan of Reorganization under the provisions of Section 77 of the Act of Congress of July 1, 1898, entitled "An Act to Establish a Uniform System of Bankruptcy Throughout the United States," as amended, and thereafter such proceedings were had that a Plan of Reorganization of said The Western Pacific Railroad Company was approved by the Interstate Commerce Commission and was certified by it to the United States District Court for the Northern District of California, Southern Division, which Court by Order dated

August 15, 1940 approved said Plan of Reorganization in all respects. Said Order was reversed upon appeal by the Circuit Court of Appeals, Ninth Circuit, on November 28, 1941; in re Western Pacific Railroad Company, 124 F. 2d, 136, but was affirmed by the Supreme Court of the United States on March 15, 1943, which reversed the judgment of the Circuit Court of Appeals; Institutional Bondholders Committee vs. The Western Pacific Railroad Corporation, 318 U. S. 448. The Reports of the Interstate Commerce Commission underlying said Plan of Reorganization appear in Official Reports of the Interstate Commerce Commission, Volume 230, pages 61 et seq.; Volume 233, pages 409 et seq.; and Volume 236, pages 1 et seq. and together with the judicial opinion already mentioned may be referred to by either party on any hearing of this cause.

V.

That subsequent to the decision of the Supreme Court of the United States rendered March 15, 1943, said Plan of Reorganization was submitted by the Interstate Commerce Commission pursuant to said Section 77 of the Bankruptcy Act, as amended, for acceptance or rejection by all classes of creditors of The Western Pacific Railroad Company entitled to vote thereon, and was accepted by more than 66 2/3% of each class of such creditors including the defendant, The Railroad Credit Corporation, which took such action without asking or securing

the approval and consent of the plaintiff as the owner of the accommodation collateral hereinbefore specified.

VI.

That said Plan of Reorganization is to be effective by its terms as of January 1, 1939, and the new securities issuable thereunder are to be issued as of said date and such thereof as bears interest are to bear interest from said date and as appears from the opinion of this Court approving said Plan the claimants or creditors entitled to receive such new securities including interest to the effective date of said Plan are as follows: [3]

Claim or interest	Principal of claim or interest	Accrued interest at contract rate to effective date of Plan
First Mortgage 5% Bond.....	\$49,290,100.00	\$13,143,776.66
Reconstruction Finance Corporation Collateral Notes....	2,963,000.00	889,869.98
The Railroad Credit Corporation Collateral Notes	2,445,609.88	145,314.23
A. C. James Co. Collateral Notes	4,999,800.00	1,249,950.00

VII.

That the First Mortgage Bonds of The Western Pacific Railroad Company are secured by a first and paramount lien on all of the properties of The Western Pacific Railroad Company, except as found in the modified Report of the Interstate Commerce Commission dated June 21, 1939 that certain assets pledged under the General and Refunding Mortgage of The Western Pacific Railroad Company and having a value not in excess of \$1,879,965 are subject to said last mentioned mortgage

as a first and paramount lien thereon. In consequence of the lien position of the First Mortgage the holders of the First Mortgage Bonds were entitled under the rule of strict priority to be made whole before any part of the trust estate covered by said First Mortgage could be made available to junior lien creditors, except that recognition might be given to such junior creditors as their equities might appear up to but not exceeding in the aggregate the aforesaid sum of \$1,879,965.

VIII.

That by the provisions of said Plan of Reorganization the holders of said First Mortgage Bonds are allocated for each \$1000 principal amount thereof together with \$266.66 $\frac{2}{3}$ of interest accrued and unpaid thereon to January 1, 1939, approximately \$400 of Income Mortgage Bonds, Series A, being 40% of the [4] principal amount of said existing bonds, \$600 of 5% Preferred Stock, Series A, being 60% of the principal amount of said Bonds, and 4.67 shares of Common Stock, being Common Stock taken at the price of \$57 a share for 100% of said accrued and unpaid interest to January 1, 1939, and identical treatment was accorded to Reconstruction Finance Corporation in respect of principal indebtedness in the amount of \$2,963,000 and accrued and unpaid interest to January 1, 1939, in consideration of an undertaking to purchase at par \$10,000,000 principal amount of new First Mortgage Bonds in order to provide \$10,000,000 in cash to pay a like amount of Trustees' Certifi-

cates. That this allotment of new securities to holders of First Mortgage Bonds made said holders whole without exhausting the security underlying the First Mortgage and included compensation for their sacrifice of prior lien position through the issue of Common Stock at the price of \$57 a share or \$5 less than the value of such stock as fixed by the Plan of Reorganization in making whole the defedant, The Railroad Credit Corporation.

IX.

That by the provisions of said Plan of Reorganization the defendant, The Railroad Credit Corporation, is allocated in respect of its claim in the principal amount of \$2,445,610 together with \$146,503 of interest accrued and unpaid thereon to January 1, 1939, but subject to reduction as hereinafter stated approximately \$154,111 of Income Mortgage 4½% Bonds, Series A, \$241,681 of 5% Preferred Stock, Series A, and 35,425 shares of Common Stock being Common Stock taken at the price of \$62 per share. That this allotment of new securities made said defendant whole and included compensation for its sacrifice of prior lien position through the issue of Common Stock at the price of \$62 per share. That inasmuch as the defendant, The Railroad Credit Corporation, had been made whole by the allocation of the above securities, (a) without resorting to pledged interest of the [5] Railroad Company or its subsidiaries under the Marshalling and Distributing Plan paid subsequent to the effective date

of the Plan and prior to the issue of the new securities or (b) without resorting at all to the accommodation collateral, provision was made in the Plan that the amount of the claim of the defendant, The Railroad Credit Corporation, should be reduced by the amounts received under the Marshalling and Distributing Plan between those dates; and no attempt was made to bring under the jurisdiction of the Bankruptcy Court any part of the accommodation collateral, as would have been necessary if the defendant was not being made whole out of security pledged by the principal debtor.

X.

That after January 1, 1939 the plaintiff received from Standard Realty and Development Company \$42,500 principal and \$22,855.97 interest on account of advances to Standard Realty and Development Company pledged to the defendant, The Railroad Credit Corporation, and turned \$37,602.10 of said amounts over to the defendant, The Railroad Credit Corporation, awaiting the outcome of the submission of the Plan for acceptance or rejection by creditors; but that the plaintiff is advised that the Plan has now been accepted by the requisite percentage of all classes of creditors entitled to vote thereon and is now in process of consummation as of the effective date January 1, 1939, and that the plaintiff is entitled to a decree requiring the defendant to refund the sums so turned over to the defendant after January 1, 1939 and cancelling the assignment made by the plaintiff to the defendant

on or about March 25, 1933 of the plaintiff's advances to the Standard Realty and Development Company and the Sacramento Northern Railway Company.

IX.

That the cause of action herein asserted arises under and by reason of the orders and decrees of this Court and the [6] Supreme Court of the United States approving the Plan of Reorganization of the debtor certified to this Court by the Interstate Commerce Commission and necessarily involves an Interpretation of said orders and decrees and in consequent is a civil action in equity arising under the Constitution and laws of the United States of America.

Wherefore, the plaintiff prays:

1. That the accommodation collateral hereinabove described be adjudged and decreed to have been exonerated, released and discharged as security for the note or notes of The Western Pacific Railroad Company held by the defendant, The Railroad Credit Corporation;

2. That the defendant, The Railroad Credit Corporation, be directed and decreed to surrender to the plaintiff for cancellation the instrument of assignment or pledge dated March 25, 1933 hereinabove described;

3. That the defendant, The Railroad Credit Corporation, be decreed to refund and repay to the plaintiff all moneys turned over to the defendant by the plaintiff since January 1, 1939, representing amounts paid by Standard Realty and Development

Company on account of advances made to it by the plaintiff and assigned by the plaintiff to the defendant by the instrument of assignment or pledge dated March 25, 1933 hereinabove described; and

4. That the plaintiff have such other and further relief in the premises as may be agreeable to the principles of equity and as to the Court shall seem meet.

Dated: This 22nd day of May, 1944.

THE WESTERN PACIFIC
RAILROAD CORPORATION,
Plaintiff

By LEROY R. GOODRICH
Its Attorney

[Endorsed]: Filed May 22, 1944. [7]

[Title of District Court and Cause.]

ALTERNATIVE MOTION TO DISMISS OR
FOR SUMMARY JUDGMENT

Defendant moves the court to dismiss the action because the complaint fails to state a justiciable claims against defendant upon which relief can be granted, or in the alternative to grant summary judgment for defendant on the ground that the allegations of both law and fact and claims for relief set forth in said complaint are the same as or substantially similar to those raising the same issues of law and fact and asserting the same claims for relief which have been submitted to and are now

under consideration by this court in the pending action No. 26591-S, In the Matter of the Western Pacific Railroad Company, Debtor, in which action both the plaintiff and defendant herein are parties.

THE RAILROAD CREDIT
CORPORATION,

By EDWARD G. BUCKLAND
Its President and Attorney

[Endorsed]: Filed May 31, 1944. [8]

[Title of District Court and Cause.]

STIPULATION

It Is Stipulated that the above entitled matter may be set for hearing on June 2, 1944 at the hour of ten o'clock A.M., or as soon thereafter as may be convenient to the court.

Notice of hearing is waived.

Dated: This 23rd day of May, 1944.

LEROY R. GOODRICH

Attorney for Plaintiff

EDWARD G. BUCKLAND

Attorney for Defendant

[Endorsed]: Filed May 31, 1944. [9]

[Title of District Court and Cause.]

APPEARANCES

To the Clerk of the Above-Entitled Court:

Please enter my appearance as one of the attorneys for defendant The Railroad Credit Corporation, the defendant in the above entitled action, in association with Edward G. Buckland, Esq., and William J. Kane, Esq., my address is #333 Montgomery Street, San Francisco, 4, California, telephone: YUkon 1977.

ARTHUR B. DUNNE,

[Endorsed]: Filed Jun. 5, 1944. [10]

[Title of District Court and Cause.]

ORDER DISMISSING ACTION

Plaintiff sues for the return of securities delivered to defendant as accommodation collateral on certain indebtedness to defendant, and for other relief in connection therewith. Defendant moves to dismiss said action on the ground that the same issues of law and fact are presented to the court in Action No. 26591-S, In the Matter of the Western Pacific Railroad Company, Debtor, a reorganization proceeding under Section 77 of the Bankruptcy Act, in which both plaintiff and defendant herein are parties. It appears to the court that the subject matter of this suit is closely connected with and a part of the said reorganization proceeding,

and that the issues contained herein are set forth in the "Petition for Reorganization Committee for an Order Construing Plan of Reorganization" etc. dated May 9, 1944, now pending before the court, and should be determined in that proceeding. It is therefore

Ordered:

The motion to dismiss is granted.

Dated: June 19, 1944.

A. F. ST. SURE

United States District Court

[Endorsed]: Filed Jun. 19, 1944. [11]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR JUDGMENT

To the Plaintiff Above Named and to Its Attorneys:

You are notified that on Monday, the 7th day of August, 1944, at 10:00 A.M. on said day, or as soon thereafter as counsel can be heard, defendant The Railroad Credit Corporation, by its attorneys, will move the above-entitled court, at its courtroom in the United States Post Office Building, Seventh and Mission Streets, San Francisco, California, to render and enter judgment herein against plaintiff and in favor of defendant and will request that said judgment be in the form of the copy hereto attached.

Said motion will be made upon all of the records, [12] papers, and files herein and upon the ground that this action has been finally concluded and determined by the order of the court granting the motion of said defendant heretofore made herein, and that upon the court's order of June 19, 1944, defendant is entitled to Judgment.

Dated: July 27th, 1944.

EDWARD G. BUCKLAND

WILLIAM J. KANE

ARTHUR B. DUNNE

Attorneys for Defendant The
Railroad Credit Corporation

(Admission of Service.)

In the United States District Court, in and for the
Northern District of California, Southern
Division

No. 23307-S

THE WESTERN PACIFIC RAILROAD COR-
PORATION,

Plaintiff,

vs.

THE RAILROAD CREDIT CORPORATION,
Defendant.

PROPOSED JUDGMENT

The defendant, The Railroad Credit Corporation, duly served and filed herein its motion to dismiss

this action and for summary judgment. Said motion came on duly and regularly to be heard and was heard on June 2, 1944. On said hearing the parties were represented by their respective attorneys. Said motion was heard upon the complaint, defendant's motion, stipulations of the parties, and evidence introduced. The matter was then argued by counsel for the parties and submitted to the court, and the court being advised, it is

Ordered, Adjudged and Decreed that plaintiff take nothing by its complaint herein and that this action be, and [14] the same is hereby dismissed and that defendant have and recover of and from plaintiff its costs of suit herein, taxed in the sum of \$.....

Done in Open Court this 7th day of August, 1944.

.....

United States District Judge

[Endorsed]: Filed Jul 31, 1944. [15]

In the United States District Court, in and for
the Northern District of California, Southern
Division

No. 23307-S

THE WESTERN PACIFIC RAILROAD COR-
PORATION,

Plaintiff,

vs.

THE RAILROAD CREDIT CORPORATION,
Defendant.

JUDGMENT

The defendant, The Railroad Credit Corporation, duly served and filed herein its motion to dismiss this action and for summary judgment. Said motion came on duly and regularly to be heard and was heard on June 2, 1944. On said hearing the parties were represented by their respective attorneys. Said motion was heard upon the complaint, defendant's motion, stipulations of the parties, and evidence introduced. The matter was then argued by counsel for the parties and submitted to the court, and the court being advised, it is

Ordered, Adjudged and Decreed that plaintiff take nothing by its complaint herein and that this action be and the same is hereby dismissed and that defendant have and recover of and from plaintiff its costs of suit herein, taxed in the sum of \$20.85.

Done in Open Court this 7th day of August, 1944.

MICHAEL J. ROCHE

United States District Judge.

[Endorsed]: Filed Aug. 7, 1944. [16]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that The Western Pacific Railroad Corporation, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order dismissing plaintiff's bill herein, made and entered on June 20, 1944, and from the judgment in the above entitled action entered on August 7, 1944.

Dated: This 16th day of September, 1944.

LEROY R. GOODRICH

Attorney for Plaintiff, The
Western Pacific Railroad
Corporation

[Endorsed]: Filed Sep. 18, 1944. [17]

Premium charge \$10.00
per annum

United States Fidelity and Guaranty Company
Baltimore - Maryland

[Title of District Court and Cause.]

\$250.00

COST BOND ON APPEAL

Know All Men By These Presents:

The We, Western Pacific Railroad Corporation, as Principal, and United States Fidelity and Guaranty Company, a corporation, having its principal place of business in the City of Baltimore, State of Maryland, and having a paid up capital stock of not less than Ten Million Dollars, duly incorporated under the laws of the State of Maryland, and having complied with all the requirements of the laws of the State of California and the United States of America respecting such corporations, for the purpose of making, guaranteeing and becoming surety on bonds and undertakings, are held and firmly bound unto Defendant in the sum of Two Hundred Fifty (\$250.00) Dollars, lawful money of the United States, to be paid to it and its respective executors, administrators and successors, of which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated this 15th day of September, 1944.

Whereas the above named Plaintiff has prosecuted an appeal to the U. S. Circuit Court of Appeals, Ninth Circuit.

Now Therefore, the condition of this obligation is such that if the above named Plaintiff shall prosecute its said appeal to effect and answer all costs, if it fails to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

The undersigned Surety agrees that in case of any breach of any condition hereof, the Court may, upon no less than ten (10) days notice to the undersigned, proceed summarily to ascertain the amount which the undersigned, as Surety, is bound to pay on account of such breach and render judgment against it and award execution therefor not to exceed the sum specified in this Undertaking.

WESTERN PACIFIC RAIL-
ROAD CORPORATION

By LEROY R. GOODRICH

Principal

UNITED STATES FIDELITY
AND GUARANTY COMPANY

By MILDRED DROST

Attorney-in-fact

State of California,
County of Alameda—ss.

On this 15th day of September in the year of our Lord One Thousand Nine Hundred and forty-four before me, J. C. Laney a Notary Public in and for said County and State, residing therein duly commissioned and sworn, personally appeared Mildred

Drost, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the United States Fidelity and Guaranty Company, and acknowledged to me that she subscribed the name of the United States Fidelity and Guaranty Company, thereto as principal, and her own name as Attorney-in-fact.

In Witness Whereof, I have hereunto set my hand and affixed my official Seal, at my office in the County and State aforesaid, the day and year in this certificate first above written.

(Attorney-in-fact)

[Seal] J. C. LANEY

Notary Public in and for said County of Alameda,
State of California.

[Endorsed]: Filed Sep. 18, 1944. [18]

[Title of District Court and Cause.]

ORDER EXTENDING TIME WITHIN WHICH
TO FILE RECORD ON APPEAL AND TO
DOCKET ACTION IN CIRCUIT COURT
OF APPEALS FOR THE NINTH CIR-
CUIT

On September 18, 1944, The Western Pacific Railroad Corporation, plaintiff herein, filed its Notice of Appeal in the above entitled action from the Order dismissing plaintiff's bill, made and entered June 20, 1944, and from the Judgment in the above entitled action entered on August 7, 1944.

The Order dismissing said action was made by the court on the ground that the subject matter of said suit and the issues of law and of facts raised thereby, are contained in the "Petition of Reorganization Committee for an Order Construing Plan of Reorganization", filed May 9, 1944, in Action No. 26591-S, "In the Matter of The Western Pacific Railroad Company, debtor", and that both The Western Pacific Railroad Corporation and The Railroad Credit Corporation [19] were parties in said bankruptcy proceeding.

On September 14, 1944, this court made its Order determining the issues presented by the said Petition of the Reorganization Committee, including the issues as to certain accommodation collateral which are the subject matter of the above entitled action. From this order, both The Railroad Credit Corporation and The Western Pacific Railroad Corporation have, on October 13, 1944, filed Notices of Appeal. It is desired that the time for filing the Record on Appeal in both actions, and for the docketing of the same, be synchronized nearly as possible.

Good Cause Appearing Therefor, It Is Hereby Ordered that appellant, The Western Pacific Railroad Corporation, may have to and including November 20, 1944 within which to file the Record on Appeal and to docket the action in the Circuit Court of Appeals for the Ninth Circuit.

Dated: This 25th day of October, 1944.

A. F. ST. SURE

Judge of the District Court of the United States,
for the Northern District of California, South-
ern Division.

[Endorsed]: Filed Oct. 25, 1944. [20]

[Title of District Court and Cause.]

THE WESTERN PACIFIC RAILROAD COR-
PORATION'S DESIGNATION OF REC-
ORD ON APPEAL

On September 18, 1944, The Western Pacific Railroad Corporation appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the Order of the above entitled court dismissing plaintiff's bill herein, made and entered on June 20, 1944, and from the judgment in the above entitled action entered on August 7, 1944. Reference is made to Notice of Appeal filed [21] in the above entitled matter on September 18, 1944.

The Western Pacific Railroad Corporation hereby designates the portions of the records, proceedings and evidence to be contained in the record on its said appeal as follows:

1. All file marks and endorsements upon all papers, documents and other matters hereinafter designated.

2. Bill of complaint of The Western Pacific Rail-

road Corporation against The Railroad Credit Corporation filed herein on May 22, 1944.

3. All of Items 1 to 25, both inclusive, all of Items 27 to 29, both inclusive, and all of Item 34, and each of said items, as the same are designated in the Designation of Record on Appeal filed by The Railroad Credit Corporation on its appeal, and as the same are designated in the Designation of Record on Appeal filed by The Western Pacific Railroad Corporation on its appeal to the United States Circuit Court of Appeals, Ninth Circuit, in an action in the District Court of the United States for the Northern District of California, Southern Division, entitled "In the Matter of The Western Pacific Railroad Company, debtor," being action numbered 26591-S, each of said appeals being from certain portions of the Order of the above entitled Court determining certain matters presented by the petition of Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, members of the Reorganization Committee in the above entitled matter, which said Petition was filed herein on May 9, 1944. Each of said appeals was filed in the District Court, in said action numbered 26591-S, on October 13, 1944.

4. Alternative motion to dismiss or for summary judgment, filed herein by The Railroad Credit Corporation on May 31, 1944.

5. Stipulation by The Western Pacific Railroad Corporation and The Railroad Credit Corporation, filed herein on May 31, 1944.

6. Appearance of Arthur B. Dunne, as attorney

for The [22] Railroad Credit Corporation, filed herein June 5, 1944.

7. Order of the above entitled court dismissing plaintiff's action made on June 19, 1944.

8. Notice of motion by defendant for Judgment, filed herein on July 31, 1944.

9. Judgment rendered and entered herein on August 7, 1944.

10. Notice of Appeal of The Western Pacific Railroad Corporation, filed herein on September 18, 1944.

11. Bond for costs on appeal made by United States Fidelity and Guaranty Company on behalf of The Western Pacific Railroad Corporation, filed herein on September 18, 1944.

12. Order Extending Time within which to file Record on Appeal and to docket action in the Circuit Court of Appeals, Ninth Circuit, made by the above entitled Court and filed on October 25, 1944, and proof of service thereof.

13. A copy of this designation.

14. A copy of the Statement of Points on which appellant The Western Pacific Railroad Corporation intends to rely, filed herein with this designation.

13. The issues involved in the appeal of The Western Pacific Railroad Corporation in the above entitled matter are substantially the same as the issues involved in the appeal in action number 26591-S entitled, "In the Matter of The Western Pacific Railroad Company, Debtor", now pending in this Court, filed on October 13, 1944 by The

Western Pacific Railroad Corporation from the Order Construing Plan of Reorganization, made by this Court and filed on September 14, 1944, and are a part of the issues raised by the appeal of The Railroad Credit Corporation from the same Order, filed October 13, 1944.

For the purpose of shortening the record on appeal herein, The Western Pacific Railroad Corporation and The Railroad Credit Corporation have agreed to file, and will file herein, a stipulation that the Circuit Court of Appeals for the Ninth Circuit [23] may make an order consolidating the appeal herein with the appeals hereinabove referred to, in action numbered 26591-S, for briefing, for oral argument and the purposes of the record, and permitting shortening of the Record on Appeal herein, and providing that each and every item or part of the record on appeal as filed by The Railroad Credit Corporation and by The Western Pacific Railroad Corporation shall be deemed a part of the transcript of the record on the appeal of The Western Pacific Railroad Corporation in the above entitled action.

When said stipulation by The Western Pacific Railroad Corporation and The Railroad Credit Corporation is filed herein, and when said Order of the Circuit Court of Appeals, consolidating said appeals and consolidating and shortening the said records on appeal, is filed in the above entitled action, then such stipulation and order are hereby designated for inclusion in the transcript of record here-

by designated in lieu of the matters described and designated in Item 3 in this designation.

Dated: This 15th day of November, 1944.

LEROY R. GOODRICH

Attorney for Plaintiff, The
Western Pacific Railroad
Corporation

[Endorsed]: Filed Nov. 18, 1944. [24]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH THE
WESTERN PACIFIC RAILROAD COR-
PORATION WILL RELY

The Western Pacific Railroad Corporation has heretofore appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from the Order made by the above entitled District Court, in the above entitled matter, on June 19, 1944 dismissing said action, and from the Judgment filed therein on August 7, 1944. [25]

Appellant hereby makes the following statement of points upon which it will rely on its appeal:

1. That the District Court was in error in making its Order of June 19, 1944, dismissing said action on the ground that the subject matter thereof was connected with and a part of a proceeding, "In the Matter of The Western Pacific Railroad Company, Debtor", No. 26591-S, then pending before said District Court, and that the issues contained

in the above entitled action were among the issues set forth in said action No. 26591-S in a "Petition of Reorganization Committee for an Order Construing Plan of Reorganization", and that said issues should be determined in said Reorganization proceeding.

The issues presented in the above entitled action **concerned the disposition of certain collateral assigned on March 25, 1933 by The Western Pacific Railroad Corporation to The Railroad Credit Corporation, as further security for certain loans or advances made by said Credit Corporation to The Western Pacific Railroad Company.** This collateral consisted of claims of The Western Pacific Railroad Corporation against The Standard Realty and Development Company, and against Sacramento Northern Railroad for money advanced each of said companies. They were not the property of the debtor, the Railway Company. They were not a part of, nor in any manner disposed of or affected by the Plan of Reorganization of The Western Pacific Railroad Company.

The rights of The Western Pacific Railroad Corporation, as assignor and of The Railroad Credit Corporation, as assignee, of said collateral were not properly determinable in the bankruptcy action. The petition in said action, then before said Court, in said Reorganization Proceeding was for an interpretation and construction of the Plan, of which said rights in said collateral were in no way a part. The District Court erred in declining to take jurisdiction of the issue raised under the above [26] en-

titled action, No. 23307-S and in granting defendant's motion to dismiss.

2. For the same reasons, the Court was in error in its Judgment, rendered and filed in the above entitled matter, on August 7, 1944.

LEROY R. GOODRICH

Attorney for The Western
Pacific Railroad Corpora-
tion

[Endorsed]: Filed Nov. 18, 1944. [27]

[Title of District Court and Cause.]

ORDER EXTENDING TIME WITHIN WHICH
TO FILE RECORD ON APPEAL AND TO
DOCKET ACTION IN THE CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT

On June 19, 1944 this Court made an Order dismissing plaintiff's bill in the above entitled action, on the ground that the subject matter of said suit, and the issues of law and of fact raised thereby, were contained in the "Petition of Reorganization Committee for an Order Construing Plan of Reorganization", filed May 9, 1944 in Action No. 26591-S, "In the Matter of The Western Pacific Railroad Company, debtor", and that both The Western Pacific Railroad Corporation and the Railroad Credit Corporation were parties in said Reorganization proceeding. On August 7, 1944 judgment was

entered in the above entitled action in favor of defendant. From this Order of June 19, 1944 and said Judgment of August 7, 1944, The Western Pacific Railroad Corporation has appealed, and has filed its Designation [28] of Record and its Statement of Points on which it will rely on appeal.

On September 14, 1944 in Action No. 26591-S, this Court made its Order determining the issues raised by said Petition of the Reorganization Committee, including the issues as to accommodation collateral which are the subject matter of the above entitled action, No. 23307-S. From this Order both The Railroad Credit Corporation and The Western Pacific Railroad Corporation have appealed, and have filed their respective Designations of Record and Statements of Points on said appeals.

It appears to the Court that further time will be required for the Clerk of this Court to prepare and perfect the records on said appeals for filing and docketing in the Circuit Court of Appeals.

Good Cause Appearing Therefor, It Is Hereby Ordered that appellant in the above entitled action, The Western Pacific Railroad Corporation, may have to and including December 16, 1944 within which to file its Record on Appeal and to docket the same in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and

It Is Further Ordered that the clerk of the District Court shall include a copy of this Order in the Record on Appeal in the above entitled matter.

Dated this 20th day of November, 1944.

A. F. ST. SURE

Judge of the District Court of the United States,
for the Northern District of California, South-
ern Division.

[Endorsed]: Filed Nov. 20, 1944. [29]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

State of California

County of Alameda—ss.

T. O. Laine, being first duly sworn, deposes and says:

I am a citizen of the United States and a resident of the County of Alameda, over the age of Twenty-one years, and not a party to or in anywise interested in the above entitled matter; that I am in the employ of the attorney for The Western Pacific Railroad Corporation in the above entitled matter, and my place of [30] business is 1002 Bank of America Building, Oakland, California; that on the 20th day of November, 1944, I deposited a full, true and correct copy of "The Western Pacific Railroad Corporation's Designation of Record on Appeal" (a copy of which is hereto attached), a full, true and correct copy of "Statement of Points on Which the Western Pacific Railroad Corporation will Rely" (a copy of which is hereto attached), and a full, true and correct copy of "Order

Extending Time within Which to File Record on Appeal and to Docket Action in the Circuit Court of Appeals for the Ninth Circuit'' (a copy of which is hereto attached), in the United States mail in said City of Oakland, County of Alameda, State of California, in a sealed envelope, with the postage thereon fully prepaid, addressed to:

Arthur B. Dunne, Esq.

Edward G. Buckland, Esq.

William J. Kane, Esq.

as attorneys for The Railroad Credit Corporation

333 Montgomery Street

San Francisco 4, California

T. O. LAINE

Subscribed and sworn to before me this 20th day of November, 1944.

[Seal] LEROY R. GOODRICH

Notary Public in and for the County of Alameda,
State of California

(“Attached to the original of the foregoing affidavit of service by mail, as the same was filed, were copies of the Statement of Points and Designation of Record referred to in said affidavit which are not herein repeated because they appear elsewhere in this transcript.”)

[Endorsed]: Filed Dec. 5, 1944. [31]

[Title of District Court and Cause.]

CERTIFIED COPY OF STIPULATION FILED
IN THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT, AND ORDER ON SAID STIPU-
LATION, IN RESPECT OF RECORD ON
APPEAL [32]

In the United States Circuit Court of Appeals
Ninth Circuit

No.

In the matter of certain appeals in the following
actions now pending in the United States Dis-
trict Court for the Northern District of Cali-
fornia, Southern Division: "In the Matter
of The Western Pacific Railroad Company,
debtor", Action No. 26591-S, and "The West-
ern Pacific Railroad Corporation v. The Rail-
road Credit Corporation", Action No. 23307-S.

STIPULATION FOR AN ORDER TO SHORTEN
THE RECORDS ON APPEAL AND TO
CONSOLIDATE APPEALS FOR BRIEF-
ING, FOR ORAL ARGUMENT AND FOR
USE OF THE RECORD

I.

There is now pending in the United States Dis-
trict Court for the Northern District of California,
Southern Division, an action #26591-S, entitled,
"In the matter of The Western Pacific Railroad
Company, debtor", a proceeding for reorganization

of said railroad company under Section #77 of the Federal Bankruptcy Act. In said action The Railroad Credit Corporation and The Western Pacific Railroad Corporation appeared as creditors of the debtor. On May 9, 1944 the Reorganization Committee filed a petition asking the District Court to construe the Plan of Reorganization of the debtor. A hearing upon said petition was had on June 2, 1944 in the District Court.

On September 14, 1944 the District Court made an order in said proceeding, construing the Plan of Reorganization then before said court.

From said order of the District Court, The Railroad Credit Corporation and The Western Pacific Railroad Corporation have filed separate appeals. Each of said appellants has filed [33] its designation of record on said appeals.

II.

There is now pending in the said District Court an action #23307-S, entitled, "The Western Pacific Railroad Corporation, plaintiff, vs. The Railroad Credit Corporation, defendant". By stipulation of plaintiff and defendant the hearing of said action, and of a motion by defendant for dismissal thereof, was heard by the District Court on June 2, 1944, and in the same proceeding and upon the same showing, evidence and record, except as to pleadings as the hearing of the aforesaid Petition of the Reorganization Committee in action #26591-S. On June 19, 1944 the District Court made an order dismissing said action #23307-S. On August 7, 1944

said District Court filed a judgment therein for defendant.

From this order and from said judgment, The Western Pacific Railroad Corporation has appealed and has filed its designation of record on appeal.

III.

It is the desire of both parties to avoid unnecessary duplication of the record in these several appeals, to save expense and labor and the time of the court, in the printing and reading of briefs and in the hearing of oral argument in connection therewith.

It Is Therefore Hereby Stipulated by The Railroad Credit Corporation and by The Western Pacific Railroad Corporation that an Order be made by the Circuit Court of Appeals for the Ninth Circuit, as follows:

(a) That the appeals separately filed by The Railroad Credit Corporation and The Western Pacific Railroad Corporation, on October 13, 1944, in the proceeding entitled "In the Matter of The Western Pacific Railroad Company, debtor". #26-591-S, and the [34] appeal filed by The Western Pacific Railroad Corporation on September 18, 1944 in the proceeding entitled, "The Western Pacific Railroad Corporation, plaintiff, vs. The Railroad Credit Corporation, defendant". #23307-S be consolidated for briefing and for oral argument, and may be heard upon the same record.

(b) That since the action entitled "The Western Pacific Railroad Corporation vs. The Railroad Cre-

dit Corporation", #23307-S, was determined upon the same evidence and record, except as to pleadings, and in the same hearing, as the Reorganization matter, action #26591-S, there need not be repeated and included in the transcript of record on appeal by The Western Pacific Railroad Corporation in said plenary action #23307-S any item or part of the record on appeal which may be included in the records on appeal in action #26591-S.

(c) That the transcript of proceedings in the District Court on June 2, 1944, and other matters of record set forth and designated in the record on appeal in either of said actions, may be used or referred to by either The Railroad Credit Corporation or The Western Pacific Railroad Corporation in their briefs, or appendices thereto, or reproduced therein, as matter included in the transcript on appeal in respect to each of the appeals hereby consolidated.

(d) That The Railroad Credit Corporation and The Western Pacific Railroad Corporation shall file a certified copy of this stipulation and of said order in the United States District Court for the Northern District of California, Southern Division, in the said matter #26591-S, and in the said matter #23307-S, and that the Clerk of said District Court shall include in the transcript of record in each of said actions a copy of this order, in preparing and certifying the same.

Dated: November 27, 1944.

THE RAILROAD CREDIT
CORPORATION

By ARTHUR B. DUNNE

Its Attorney

THE WESTERN PACIFIC
RAILROAD CORPORATION

By LEROY R. GOODRICH

Its Attorney [35]

ORDER TO CONSOLIDATE APPEALS AND
TO SHORTEN RECORD

The foregoing Stipulation having been read and
approved, and

Good cause appearing therefor,

It Is So Ordered.

CURTIS D. WILBUR

Senior United States Circuit
Judge

A True Copy;

Attest: Nov. 28, 1944.

PAUL P. O'BRIEN

Clerk

[Endorsed]: Filed Nov. 28, 1944. Paul P. O'Brien
Clerk.

[Endorsed]: Filed Nov. 29, 1944. [36]

[Title of District Court and Cause.]

ORDER EXTENDING TIME WITHIN WHICH
TO FILE RECORD ON APPEAL, AND TO
DOCKET ACTION IN CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT

There is now pending in the United States District Court for the Northern District of California, Southern Division, and action numbered 23307-S entitled "The Western Pacific Railroad Corporation v. The Railroad Credit Corporation", On June 20, 1944 the District Court made an order dismissing plaintiff's action and on August 7, 1944 the District Court filed a judgment in said action in favor of the defendant.

On September 18, 1944 The Western Pacific Railroad Corporation filed its notice of appeal from said order and said judgment and thereafter filed in said District Court its designation of record on appeal and statement of points on which said appellat will rely. Thereafter the District Court made an order extending time for the filing of said record on appeal and the docketing of said appeal in the Circuit Court of Appeals for the Ninth Circuit to and including December 16, 1944. Due to the extensiveness of the matters to be contained in the transcript of the record on appeal the Clerk of said District Court is unable to prepare the transcript of the record on appeal with the allotted time and it is desired that additional time be granted by this court for the filing of the record on appeal and for the docketing of the action.

Good Cause Appearing Therefor, it is hereby ordered that the appellant, The Western Pacific Railroad Corporation, may have to and including January 15, 1945 within which to file the record on appeal and to docket said action in the Circuit Court of Appeals Ninth Circuit. [37]

And It Is Further Ordered that the Clerk of the District Court shall include a copy of this order in the record on appeal in the above entitled matter.

CURTIS D. WILBUR

United States Circuit Judge

Dated: December 15, 1944.

A True Copy.

Attest: Dec. 15, 1944

PAUL P. O'BRIEN

Clerk.

[Endorsed]: Filed Dec. 15, 1944. Paul P. O'Brien, Clerk

[Endorsed]: Filed Dec. 15, 1944. C. W. Calbreath, Clerk. [38]

[Title of District Court and Cause.]

AMENDMENT AND SUPPLEMENT TO DESIGNATION OF RECORD ON APPEAL OF THE WESTERN PACIFIC RAILROAD CORPORATION

The Western Pacific Railroad Corporation's Designation of Record on Appeal, filed herein on

November 18, 1944, is amended and supplemented as follows:

Also include in the record on appeal the affidavit of T. O. Laine filed herein on December 5, 1944 showing service by mail of Statement of Points and Designation of Record on Appeal of The Western Pacific Railroad Corporation. [39]

Attached to said affidavit were copies of said Statement of Points and said Designation of Record on Appeal. These copies need not be repeated, but there may be substituted therefor the following statement:

“Attached to the original of the foregoing affidavit of service by mail, as the same was filed, were copies of the Statement of Points and Designation of Record referred to in said affidavit which are not herein repeated because they appear elsewhere in this Transcript.”

Also include in the record on appeal a copy of this Amendment and Supplement to Designation.

Dated: This 5th day of January, 1945.

LEROY R. GOODRICH

Attorney for The Western Pacific Railroad Corporation.

[Endorsed]: Filed Jan. 6, 1945. [40]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRAN-
SCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 40 pages, numbered from 1 to 40, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of The Western Pacific Railroad Company, Debtor No. 26591 S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Six & 40/100 Dollars and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 12th day of January A. D. 1945.

[Seal]

C. W. CALBREATH

Clerk

E. H. Norman

Deputy Clerk [41]

[Endorsed]: No. 10966. United States Circuit Court of Appeals for the Ninth Circuit. The Western Pacific Railroad Corporation, Appellant. vs. The Railroad Credit Corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed January 12, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH THE
WESTERN PACIFIC RAILROAD CORPO-
RATION INTENDS TO RELY, AND DES-
IGNATION OF RECORD TO BE RELIED
UPON AND APPLICATION FOR ORDER
IN RESPECT OF PRINTING RECORD

The Western Pacific Railroad Corporation on September 18, 1944 appealed from the order of the District Court of the United States for the Northern District of California, Southern Division, made and entered June 20, 1944 dismissing plaintiff's bill in an action numbered 23307-S in said Court, entitled "The Western Pacific Railroad Corporation, plaintiff vs. The Railroad Credit Corporation, defendant", and from the judgment in said action entered on August 7, 1944.

On November 18, 1944 appellant filed in said District Court its "Statement of Points on Which The Western Pacific Railroad Corporation Will Rely", and "The Western Pacific Railroad Corporation's Designation of Record on Appeal", and thereafter filed its affidavit of service of true and correct copies of said documents upon defendant and appellee, The Railroad Credit Corporation, which said documents are included in the original certified record on appeal in the above entitled matter and which appear therein at the following pages:

Statement of Points on which 'The Western Pacific Railroad Corporation Intends to Rely, Page 25—Original Certified Record.

The Western Pacific Railroad Corporation's Designation of Record on Appeal, Page 21—Original Certified Record.

Affidavit of Service by Mail, Page 30—Original Certified Record.

The Western Pacific Railroad Corporation hereby states that on this appeal it intends to rely on those points set out and designated in the above "Statement of Points on Which The Western Pacific Railroad Corporation Intends to Rely."

The Western Pacific Railroad Corporation further states that those documents designated in the above "The Western Pacific Railroad Corporation's Designation of Record on Appeal" are necessary for the consideration of the Court on this appeal.

Certain of the documents so designated were heretofore certified to the above entitled Court in that certain matter in the above entitled Court entitled

and numbered in said Court, "In the Matter of The Western Pacific Railroad Company, debtor-Western Pacific Railroad Corporation, a corporation, et al, Appellants vs. Institutional Bondholders Committee, et al, Appellees, No. 9714. Heretofore and on November 21, 1944, the above entitled Court, on the application of appellants in this matter, The Railroad Credit Corporation and The Western Pacific Railroad Corporation made and filed its order in connection with the present appeals, authorizing the elimination from the original certified record on these appeals of all matters heretofore certified to this Court and contained in the records of this Court in the said matter in this Court No. 9714, upon the inclusion in the original certified record on these appeals of a copy of said order of this Court of November 21, 1944 contained in the original certified record on these appeals at page 163 thereof, and, accordingly, matters contained in the record in the said matter No. 9714 have been eliminated from the original certified record on these appeals.

On November 28, 1944 this Court, in pursuance and approval of a stipulation filed on that date by The Western Pacific Railroad Corporation and The Railroad Credit Corporation, made an Order to consolidate the appeals separately filed by The Railroad Credit Corporation and by The Western Pacific Railroad Corporation on October 13, 1944 in the proceeding entitled, "In the Matter of The Western Pacific Railroad Company, debtor", No.

26591-S, and the appeal filed by The Western Pacific Railroad Corporation on September 18, 1944 in the proceeding entitled "The Western Pacific Railroad Corporation vs. The Railroad Credit Corporation", numbered 23307-S, and that there need not be repeated and included in the transcript of record on appeal by The Western Pacific Railroad Corporation in said action No. 23307-S any item or part of the records on appeal in action No. 26591-S.

Appellant, The Western Pacific Railroad Corporation, prays that the said matters so included in the original certified record on these appeals by reference, but physically excluded in pursuance of said Orders of this Court of November 21, 1944, and of November 28, 1944 be not printed, and that this Court make its order accordingly, and that in said order this Court grant leave to the parties to make reference, or reproduce in their briefs, in respect to any of said appeals, any parts of said record physically excluded from the certified records on any of said appeals, in the same manner as though the said matters were printed as a part thereof.

Dated: January 15, 1945.

LEROY R. GOODRICH

Attorney for The Western
Pacific Railroad Corporation.

[Endorsed]: Filed Jan. 15, 1945. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER IN RESPECT OF PRINTING OF
RECORDS

Good Cause Appearing Therefor, It Is Ordered that in printing the record on appeals in the above entitled matters it shall be necessary to print only the matter physically contained in the original certified records as certified to this court by the Clerk of the United States District Court for the Northern District of California, Southern Division, and it shall not be necessary to print any matter therein contained by reference by reason of the Order of this court made November 21, 1944, or the order of this court made November 28, 1944, a copy of which appears in said original certified records on appeal, and

It Is Further Ordered that any of the parties may refer to or reproduce in their briefs or as appendices thereto any matter appearing in the said records by reference, but physically excluded by reason of the aforesaid orders of this court.

Dated: January 15, 1945.

FRANCIS A. GARRECHT

United States Circuit Judge

[Endorsed]: Filed Jan. 16, 1945. Paul P. O'Brien, Clerk.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

THE WESTERN PACIFIC RAILROAD
CORPORATION,

vs.

Appellant,

No. 10,966

THE RAILROAD CREDIT CORPORATION,

Appellee.

(CONSOLIDATED
CASES)

THE WESTERN PACIFIC RAILROAD CORPORA-
TION (a corporation),

vs.

Appellant,

No. 10,962

THE RAILROAD CREDIT CORPORATION
(a corporation),

Appellee.

OPENING BRIEF OF APPELLANT,
THE WESTERN PACIFIC RAILROAD CORPORATION.

LEROY R. GOODRICH,

Bank of America Building, Oakland 12, California,

Attorney for said Appellant.

F. C. NICODEMUS, JR.,

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Of Counsel.

FILED

APR 17 1945

PAUL P. O'BRIEN,
CLERK

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IN THE
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CORPORATION,

vs.

Appellant,

No. 10,962

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Appellee.

(CONSOLIDATED
CASES)

THE WESTERN PACIFIC RAILROAD CORPORA-
TION (a corporation),

vs.

Appellant,

No. 10,966

THE RAILROAD CREDIT CORPORATION
(a corporation),

Appellee.

**OPENING BRIEF OF APPELLANT,
THE WESTERN PACIFIC RAILROAD CORPORATION.**

STATEMENT OF THE JURISDICTIONAL FACTS.

The appeals herein presented by The Western Pacific Railroad Corporation are from two orders of the District Court of the United States, for the Northern District of California, Southern Division. Both orders and both appeals deal with the same subject matter, and involve the right claimed by The

Western Pacific Railroad Corporation to recover from The Railroad Credit Corporation certain accommodation collateral (or cash received thereon) furnished by the appellant as partial security for certain notes given by The Western Pacific Railroad Company, debtor, to The Railroad Credit Corporation.

1. One appeal, No. 10966, is from an order of the District Court entered June 20, 1944 (R. 10966, p. 12), and from a Judgment of the District Court entered August 7, 1944 (R. 10966, p. 16), which dismissed a bill of complaint filed on May 22, 1944 (R. 10966, p. 2), by The Western Pacific Railroad Corporation against The Railroad Credit Corporation to recover certain accommodation collateral (or cash received thereon), furnished directly by The Western Pacific Railroad Corporation as partial security for certain promissory notes given by The Western Pacific Railroad Company, debtor, to The Railroad Credit Corporation.

Notice of appeal from said order and Judgment was filed by appellant on September 18, 1944 (R. 10966, p. 17). On November 18, 1944, appellant filed its statement of points on which it intended to rely on its appeal. (R. 10966, p. 26.)

2. The other appeal, No. 10962, is from an order made by the District Court on September 14, 1944, in action No. 26591-S (R. 10962, p. 143), which was the original proceeding for the reorganization of The Western Pacific Railroad Company heretofore before this court in *In re The Western Pacific Railroad Com-*

pany, 9714, 124 Fed. (2d) 136, and before the Supreme Court of the United States, 318 U. S. 449.

On May 2, 1944, a petition was filed in the District Court by Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, the members of the Reorganization Committee of The Western Pacific Railroad Company, debtor, for an order of said District Court construing said Plan of Reorganization in Various Respects and Reconciling Inconsistencies Therein. (R. 10962, pp. 69-96.) A hearing upon this petition was held on June 2, 1944, in the District Court. (R. 10962, p. 109.) On June 21, 1944, said Court made and filed a Corrected Memorandum Opinion and Order Construing Plan of Reorganization. (R. 10962, p. 98.) On September 14, 1944, the District Court made the order from which appeal is taken by The Western Pacific Railroad Corporation, an Order Construing Plan of Reorganization in Various Respects and Reconciling Inconsistencies Therein. (R. 10962, p. 143.)

Notice of Appeal from said order was filed by this appellant with the Clerk of the District Court on October 13, 1944. (R. 10962, p. 150.) On November 18, 1944, appellant filed with the Clerk of the District Court its Statement of Points upon which it intended to rely on its appeal. (R. 10962, p. 175.)

The Railroad Credit Corporation has likewise appealed from certain portions of the Order of the District Court, entered September 14, 1944, in the reorganization proceeding.

On November 28, 1944, The Railroad Credit Corporation and The Western Pacific Railroad Corporation filed with this Court a Stipulation for an order to shorten the records on appeal and to consolidate the three appeals for briefing, for oral argument and for use of the record. (R. 10962, p. 185.) An order so providing was entered November 29, 1944. (R. 10962, p. 189.)

STATEMENT OF CASE AND QUESTIONS INVOLVED.

At the outset a word of explanation of the double appeals by The Western Pacific Railroad Corporation, and the separate appeal by The Railroad Credit Corporation should be helpful to this Court.

On or about March 25, 1933, The Western Pacific Railroad Corporation pledged and assigned to The Railroad Credit Corporation certain accommodation collateral as partial security for money loaned by the Credit Corporation to The Western Pacific Railroad Company, the carrier. This accommodation collateral included certain indebtedness due The Western Pacific Railroad Corporation from:

(1) The Standard Realty and Development Company in the sum of \$120,000, for advances made to that company;

(2) Sacramento Northern Railway in the sum of \$856,250, for advances to said Railway. (R. 10962, p. 52.)

In the original proceeding for the reorganization of the carrier, The Western Pacific Railroad Com-

pany, the question was raised by various parties as to the status of accommodation collateral pledged by persons other than the debtor as security for notes of the debtor held by The Railroad Credit Corporation. No provision with regard to such collateral was included in the Plan of Reorganization.

In dealing with this question, the Supreme Court of the United States, in the opinion written by Mr. Justice Reed, said:

“None of the collateral, other than the refunding bonds, was a claim against the debtor. A. C. James Company and The Western Pacific Railroad Corporation perhaps had unsecured claims against the debtor for their securities and other collateral which the debtor had borrowed, but these were held worthless as claims against the debtor. 233 I.C.C. 452. This collateral, other than the refunding bonds, was therefore left with the pledgees with its position unaffected by any direct action of the commission.”

And further:

“The A. C. James Company’s unsecured claim against the debtor for the loan of the bonds is valueless, 233 I.C.C. 452, and the plan does not deal with any possible claim of accommodation pledgors against pledgees of bonds which were not the property of the debtor.” 318 U. S. 506.

The clear implication of what is here said, appellant believes and contends, is that the conflicting claims of the pledgors and pledgees of property which does not belong to the debtor is outside the jurisdic-

tion of the Bankruptcy Court in a proceeding under Section 77; that no attempt was made to deal with this controversy in the Plan of Reorganization, and that in order to settle such a controversy resort must be had to an independent proceeding in a court of general jurisdiction.

On May 9, 1944, the Reorganization Committee filed in the District Court in this proceeding, No. 26591-S, a Petition entitled "Petition of Reorganization Committee for an Order Construing Plan of Reorganization in Various Respects and Reconciling Inconsistencies Therein" in which they invoke Subdivision V of the plan of reorganization authorizing the court to construe the Plan; and pursuant to this authority asked that the District Court adjudicate the conflicting claims of The Western Pacific Railroad Corporation and The Railroad Credit Corporation to the accommodation collateral referred to in the opinion of the Supreme Court. (R. 10962, p. 69.)

The appellant believes and contends that the District Court was, and is, without power and jurisdiction to adjudicate the issue in the bankruptcy proceeding for the following reasons:

(a) The Supreme Court has so held;

(b) The accommodation collateral was not the property of the debtor, was not dealt with in the Plan, and the District Court may not construe the Plan *as to matters not embraced therein*;

(c) The District Court, in construing the Plan pursuant to Subdivision V of the Plan, acts as an arbitrator, not as a Judge, and his determi-

nation as to a matter within the scope of the arbitration (which this controversy is not) is final and conclusive as to all parties to the Plan (which The Western Pacific Railroad Corporation is not). Or to state the same proposition in somewhat different language: All parties who are participating in the reorganization have accepted Article V, and have thereby agreed not to appeal from the determination of the District Court.

For these reasons, among others, The Western Pacific Railroad Corporation, as owner of the accommodation collateral now in controversy brought an appropriate suit against The Railroad Credit Corporation in the same District Court in which the bankruptcy proceeding was pending. (R. 10966, p. 2.) In this bill, this appellant asked:

“1. That the accommodation collateral hereinabove described be adjudged and decreed to have been exonerated, released and discharged as security for the note or notes of The Western Pacific Railroad Company held by the defendant, The Railroad Credit Corporation;

“2. That the defendant, The Railroad Credit Corporation, be directed and decreed to surrender to the plaintiff for cancellation the instrument of assignment or pledge dated March 25, 1933, hereinabove described;

“3. That the defendant, The Railroad Credit Corporation, be decreed to refund and repay to plaintiff all moneys turned over to the defendant by the plaintiff since January 1, 1939, representing amounts paid by The Standard Realty and Development Company on account of advances made to it by the plaintiff and assigned by the

plaintiff to the defendant by the instrument of assignment or pledge dated March 25, 1933, hereinabove described.”

The learned District Court, seeming to be of the opinion that the Court was free to determine the controversy in either of the two proceedings, chose to decide it in the bankruptcy proceeding rather than in the separate suit, and on June 19, 1944, entered the Order dismissing the independent suit, reciting that:

“It appears to the court that the subject matter of this suit is closely connected with and a part of the said reorganization proceedings, and that the issues contained herein are set forth in the ‘Petition of Reorganization Committee for an Order Construing Plan of Reorganization’ etc., dated May 9, 1944, now pending before the court, and should be determined in that proceeding. It is therefore

ORDERED:

The motion to dismiss is granted.”

Thereafter, on August 7, 1944, a judgment for dismissal of the bill filed by this appellant was entered, on motion of The Railroad Credit Corporation. (R. 10966, p. 16.)

In the appeals herein presented, appellant respectfully urges, first, that the District Court did not possess the freedom of selection which, the record shows, was exercised and that he should have decided the issue in the independent action. Appellant will therefore ask that this court reverse the Order of the

District Court made on June 20, 1944, and the Judgment of the District Court entered August 7, 1944, which dismissed the independent Bill of Complaint, for the reason (a) that appellant's independent bill does state a cause of action against The Western Pacific Railroad Corporation for the relief prayed for, and (b) that the subject matter of the suit was not properly embraced in the "Petition of the Reorganization Committee dated May 9, 1944".

But The Western Pacific Railroad Corporation wants the basic question at issue in these appeals decided: namely, whether by reason of the provisions in the Plan of Reorganization of The Western Pacific Railroad Company, as approved by the Supreme Court, this appellant is not now entitled to have returned to it as exonerated the accommodation collateral furnished by appellant to The Railroad Credit Corporation, together with all moneys paid since January 1, 1939, by The Standard Realty and Development Company on account of its indebtedness to appellant, assigned by appellant to The Railroad Credit Corporation.

Accordingly in its appeal No. 10962, appellant will ask this Court to reverse the Order of the District Court of September 14, 1944, insofar as that Order deals with the respective rights and interests of The Western Pacific Railroad Corporation and The Railroad Credit Corporation in the accommodation collateral above referred to, for the reason, (a) that said Order purports to deal with matters not embraced in the Plan of Reorganization and hence *ultra*

vires of the court under Article V of the Plan of Reorganization, and (b) for the reason that the new securities allocated to The Railroad Credit Corporation under the Plan, in payment of its claim against the debtor, were to be taken at the values fixed by and in the Plan; that such securities, under the terms of the Plan, were to be issued in full satisfaction of its claim, and that thereby the accommodation collateral furnished and pledged by this appellant was exonerated and should be returned to appellant, together with any moneys paid by The Standard Realty and Development Company on account of its indebtedness to The Western Pacific Railroad Corporation, assigned by the instrument of March 25, 1933.

SPECIFICATIONS OF ERRORS RELIED UPON.

Appeal No. 10,966.

“1. That the District Court was in error in making its Order of June 19, 1944, dismissing said action on the ground that the subject matter thereof was connected with and a part of a proceeding, ‘In the Matter of The Western Pacific Railroad Company, Debtor’, No. 26591-S, then pending before said District Court, and that the issues contained in the above entitled action were among the issues set forth in said action No. 26591-S in a ‘Petition of Reorganization Committee for an Order Construing Plan of Reorganization’, and that said issues should be determined in said Reorganization proceeding.

The issues presented in the above entitled action concerned the disposition of certain collateral as-

signed on March 25, 1933 by The Western Pacific Railroad Corporation to The Railroad Credit Corporation, as further security for certain loans or advances made by said Credit Corporation to The Western Pacific Railroad Company. This collateral consisted of claims of The Western Pacific Railroad Corporation against The Standard Realty and Development Company, and against Sacramento Northern Railroad for money advanced each of said companies. They were not the property of the debtor, the Railway Company. They were not a part of, nor in any manner disposed of or affected by the Plan of Reorganization of The Western Pacific Railroad Company.

The rights of The Western Pacific Railroad Corporation, as assignor and of The Railroad Credit Corporation, as assignee, of said collateral were not properly determinable in the bankruptcy action. The petition in said action, then before said Court, in said Reorganization Proceeding was for an interpretation and construction of the Plan, of which said rights in said collateral were in no way a part. The District Court erred in declining to take jurisdiction of the issue raised under the above entitled action, No. 23307-S and in granting defendant's motion to dismiss.

2. For the same reasons, the Court was in error in its Judgment, rendered and filed in the above entitled matter on August 7, 1944."

Appeal No. 10,962.

"1. That the District Court erred in that portion of the Order of September 14, 1944 appealed from by The Western Pacific Railroad Corporation (particularly paragraph (c) of the Findings

and Conclusions upon which said Order is based) in holding that the rights of The Railroad Credit Corporation under its pledge agreement with The Western Pacific Railroad Corporation will not be affected by the issuance of the new securities to The Railroad Credit Corporation.

2. That the District Court erred in that portion of its Order of September 14, 1944 appealed from by The Western Pacific Railroad Corporation (particularly paragraph (c) of the Findings and Conclusions upon which said Order is based) in holding that The Railroad Credit Corporation is entitled to proceed against the collateral pledged, under its pledge agreement with The Western Pacific Railroad Corporation dated March 25, 1933, to the extent that the actual or market value of the new securities to be issued to The Railroad Credit Corporation shall not satisfy its claim.

3. That the District Court erred in said Order of September 14, 1944, appealed from by The Western Pacific Railroad Corporation (and particularly paragraph (5) of said Order) in adjudging and decreeing that The Railroad Credit Corporation is entitled to retain the claims against Standard Realty and Development Company and Sacramento Northern Railway pledged to and with The Railroad Credit Corporation by The Western Pacific Railroad Corporation by an instrument dated March 5, 1933, and to apply the proceeds thereof in satisfaction of its claim against the debtor.

4. That no provision was made in the Plan of Reorganization as certified by the Interstate Commerce Commission and as affirmed by the Su-

preme Court of the United States, affecting the collateral assigned on March 5, 1933 by The Western Pacific Railroad Corporation. The claims against The Standard Realty and Development Company, and Sacramento Northern Railway were the property of The Western Pacific Railroad Corporation. They were not loaned to the debtor, The Western Pacific Railroad Company. They at no time constituted any part of the assets of the debtor. It was not within the jurisdiction of the Interstate Commerce Commission to provide for the disposition of the said claims, as between The Railroad Credit Corporation and The Western Pacific Railroad Corporation, upon final consummation of the Plan. The Commission specifically declined to make any such provision. The position it took was confirmed by the judgment of the Supreme Court.

The District Court was in error, in taking jurisdiction of this question, under the Petition of the Reorganization Committee, filed May 9, 1944, and in dismissing the action brought independently by The Western Pacific Railroad Corporation, in a bill numbered 23307-S in said District Court.

5. The District Court erred in its interpretation of the Plan of Reorganization of the debtor company, as such interpretation appears in its Order of September 14, 1944 in that the Court assumes that the value of the new securities to be issued under said Plan is to be measured, not by the values fixed thereon by the Commission, but by the market values of such securities, and that such securities, when issued to the various creditors entitled thereto under the provisions of the

Plan, are not to be accepted by said creditors, including The Railroad Credit Corporation, in satisfaction of their claims, and at the values fixed by the Commission on said securities. The Plan provides no other basis of value, upon which such securities are to be issued or taken. The adoption of market values as distinguished from the values fixed by the Commission would destroy the fairness and validity of the allocation of such securities to all the classes of creditors entitled to receive them, as such allocation was made by the Plan, and affirmed by the Supreme Court.”

ARGUMENT.

I.

THE DISTRICT COURT ERRED IN MAKING ITS ORDER OF JUNE 19, 1944, AND IN ITS JUDGMENT FILED ON AUGUST 7, 1944, DISMISSING THE INDEPENDENT BILL OF COMPLAINT FILED BY THE WESTERN PACIFIC RAILROAD COMPANY AGAINST THE RAILROAD CREDIT CORPORATION.

(See Specified Errors 1 and 2; R. 10966, pp. 26-28.)

Upon the filing of appellant's bill against The Railroad Credit Corporation, the parties agreed to file, and did file with the District Court, on May 31, 1944, a stipulation that the matter might be heard on June 2, 1944, the date already set for the hearing of the Petition of the Reorganization Committee for construction by the District Court of the Plan of Reorganization. Simultaneously, The Railroad Credit Corporation filed an Alternative Motion to Dismiss or for Summary Judgment. (R. 10966, p. 10.) Argument on the Peti-

tion and on the Bill of Complaint were heard simultaneously by the Court, and the motion to dismiss granted by the Order of June 19, 1944.

It is the contention of appellant that the issues respecting the rights of the parties in the accommodation collateral were not properly within the jurisdiction of the District Court in the hearing in the bankruptcy matter. Section 77 of the Bankruptcy Act, as amended, grants to the District Court in which a Petition for a Plan of Reorganization is filed, "exclusive jurisdiction of the debtor and its property wherever located". (Bankruptcy Act, Section 77(a); 11 U.S.C. 205.) Nowhere in the statute is there any grant of jurisdiction to the Court to determine, within the scope of any hearing with respect to the reorganization, the rights, as between themselves alone, of creditors of the debtor railroad in and to property which is not and has at no time been the property of the debtor. Conflicting interests of creditors of the debtor in property of the debtor are, of course, determinable in the bankruptcy proceedings.

The Interstate Commerce Commission, in an early order approving a Plan of Reorganization, provided that the rights of the Reconstruction Finance Corporation and Railroad Credit Corporation "in collateral pledge with them by parties other than the debtor" should not be disturbed or altered. (230 I.C.C. 102; subdivision O of the Order of October 10, 1938.) Subsequently, in considering petitions filed for modification of this Order, the Commission declined to direct

that this collateral be “surrendered to the pledgors thereof”. (233 I.C.C. 431, 432.)

And in its order promulgating the Plan of Reorganization finally approved by the District Court, and by the Supreme Court, the Commission included no provision comparable to subdivision O of its earlier order preserving the rights of The Reconstruction Finance Corporation and Railroad Credit Corporation in the collateral pledged with them by “parties other than the debtor”. (236 I.C.C. 1.) The sole provision in the final order of the Commission, and therefore in the present Plan of Reorganization, as to the collateral securing the claims of The Reconstruction Finance Corporation and Railroad Credit Corporation is found in subdivision R of that final order:

“All collateral *pledged by the debtor* as security for notes to the Reconstruction Finance Corporation, the Railroad Credit Corporation, and the A. C. James Company, shall be reduced to possession by the respective pledgees thereof, and shall be by them surrendered to the reorganized company and cancelled * * *” (233 I.C.C. 453.)

In brief, the Interstate Commerce Commission nowhere in the Plan of Reorganization determined, or attempted to determine, the rights of the pledgors and pledgees in accommodation collateral not the property of, and not pledged by the debtor.

“This collateral”, says the opinion of the Supreme Court in affirming the approval by the District Court of the Plan of Reorganization, “other than the refunding bonds, was therefore left with the pledgees

with its position unaffected by any direct action of the Commission." (318 U. S. 506.) And later: "Of course the collateral loaned to the debtor which was not an obligation of the debtor, could not be ordered by the plan to be cancelled. It remained with the pledgees * * * The plan does not deal with any possible claim of accommodation pledgors against pledgees of bonds which were not the property of the debtor." (318 U. S. 506.)

The disposition of the respective rights of The Western Pacific Railroad Corporation and The Railroad Credit Corporation was, therefore, not reached by the Plan. The Commission refused, and we think quite properly, to include it in the Plan. The Supreme Court approved the position taken by the Commission.

When the Reorganization Committee filed with the District Court its petition of May 9, 1944, for an Order of that Court, construing the Plan of Reorganization etc., it did so under the provision found in subdivision V of the Plan. Under the wording of that subdivision, the Court is charged only with the duty and vested only with the power, to construe, to cure defects, supply omissions, or reconcile inconsistencies *in the Plan* as may be necessary or expedient to carry out the Plan effectively. (233 I.C.C. 455.) (See R. 10962, p. 69.) In so doing the Court acts as an arbiter. It decides questions which affect the parties to the Plan of Reorganization, which this appellant was not. It cannot, within this subdivision, determine the rights of contending parties in property not affected by the Plan, and in which at no time the debtor in the reorganization proceeding had any interest.

The sole ground upon which the District Court made its order dismissing appellant's bill of complaint was, as stated therein, that the subject matter of that suit was closely connected with *and a part of* the reorganizaion proceeding, and that the issues contained in the bill were set forth in the Petition of the Reorganization Committee, and should be determined in that proceeding. In this we believe that the learned Court erred.

For the same reasons, we believe that the Court erred in its judgment filed August 7, 1944, dismissing the bill.

II.

THE DISTRICT COURT ERRED IN ITS INTERPRETATION OF THE PLAN OF REORGANIZATION, IN ASSUMING THAT THE VALUE OF THE NEW SECURITIES TO BE ISSUED UNDER THE PLAN WAS TO BE MEASURED, NOT BY THE VALUES FIXED THEREON BY THE COMMISSION BUT BY THE MARKET VALUES OF SUCH SECURITIES, AND IN CONCLUDING THAT THE RAILROAD CREDIT CORPORATION UNDER THE PLAN WAS AUTHORIZED TO RECEIVE IN FULL SUCH SECURITIES AND NEVERTHELESS RETAIN AND PROCEED AGAINST THE ACCOMMODATION COLLATERAL PLEDGED AND OWNED BY APPELLANT.

(See Specified Errors 1-5; R. 10962, pp. 175-178.)

The basic facts regarding the pledge of the accommodation collateral are not in dispute.

The Railroad Credit Corporation was organized in December, 1931, pursuant to what is referred to in the record as the Marshalling and Distributing Plan, 1931. (R. 10962, pp. 5-26.) The railroad industry in

the period of the depression had appealed to the Interstate Commerce Commission for an increase in freight rates in a proceeding known as the Fifteen Per Cent. Case 1931, Ex parte 103. The Commission granted partial relief but only upon condition that the stronger carriers pay over all earnings derived from the increased rates into a pool from which loans might be made to weaker carriers threatened with receivership or bankruptcy. The Railroad Credit Corporation was set up to carry out this arrangement. Loans were made to weaker carriers, sometimes with and sometimes without adequate collateral but it became customary for The Railroad Credit Corporation to require each borrower to pledge as part security for the repayment of the loan its distributive share of the moneys repaid by the more fortunate borrower. Large sums were paid into the pool by the participants and a very large part was ultimately repaid as the result of successful liquidation of most of the loans made by The Railroad Credit Corporation. Among the good loans made by The Railroad Credit Corporation were two loans made to The Western Pacific Railroad Company, one in the amount of \$1,303,000, dated June 29, 1932, the other in the amount of \$1,293,439, dated March 25, 1933. (R. 10962, pp. 44-59.) The collateral for these notes is shown in the note dated March 25, 1933. (R. 10962, pp. 53-54.) Endorsed on these notes are credits applied thereon which represents amounts received by The Western Pacific Railroad Company and its subsidiaries under the Marshalling and Distributing Plan. As of January 1, 1939 the amounts

due upon these notes were \$2,455,610 together with \$146,503 of interest accrued and unpaid to January 1, 1939. (R. 10962, p. 72.)

The collateral security for these notes consisted of the following items:

(a) *Debtor Collateral*

Refunding Mortgage Bonds of the Debtor, Series A, pledged by the Debtor	\$2,000,000
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Refunding Mortgage Bonds of the Debtor, Series B, pledged by the Debtor	2,000,000
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Assignment of moneys due the Debtor and subsidiary under the Marshalling and Distributing Plan made and executed by the Debtor.

Assignment of equity in collateral pledged with Reconstruction Finance Corporation.

(b) *Accommodation Collateral*

Advances from The Western Pacific Railroad Corporation to the Debtor pledged by The Western Pacific Railroad Corporation	\$5,494,722
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Advances from The Western Pacific Railroad Corporation to the Standard Realty and Development Company pledged by The Western Pacific Railroad Corporation	120,000
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Advances from The Western Pacific Railroad Corporation to the

Sacramento Northern Railway pledged by the Western Pacific Railroad Corporation	856,200
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(This subject to possible claim by
Trustees of Railroad Company or
its First Mortgage.)

(See footnote to Opinion of Judge St. Sure in *In re Western Pacific Railroad Company*, 34 Fed. Supp. 493.)

On August 2, 1936, The Western Pacific Railroad Company filed its Petition in the District Court and in the Interstate Commerce Commission for reorganization under Section 77. This Court is familiar with the subsequent proceedings which resulted in the reorganization effective as of January 1, 1939. The history of the proceeding is disclosed by the Reports of the Interstate Commerce Commission, 230 I.C.C. 61; 233 I.C.C. 409; 236 I.C.C. 1; the Opinion of the District Court, 34 Fed. Supp. 493; the Opinion of this Court, 124 Fed. (2d) 136; and the Opinion of the United States Supreme Court, 318 U. S. 448.

We are here concerned with what was done by the Plan of Reorganization in making whole the holders of First Mortgage Bonds of the Debtor and The Railroad Credit Corporation as a secured creditor.

The First Mortgage Bonds were outstanding as of January 1, 1939, the effective date of the Plan, in the principal amount of \$49,290,100. Interest accrued and unpaid as of that date amounted to \$13,143,776.66. These Bonds were dated March 1, 1916, bore interest

at 5% and mature March 1, 1946 (233 I.C.C. 409; 34 Fed. Supp. 493.) The First Mortgage Bonds were secured by a First Mortgage on all of the Debtor's properties valued for purposes of reorganization at \$97,863,522 except that moneys and securities amounting or valued by the Commission at \$1,879,965 were deposited and pledged under and were subject to the paramount lien of the Debtor's Refunding Mortgage. (R. 10966, pp. 5-6.) *Ecker v. Western Pacific Railroad Corporation*, 318 U. S. 448. Under the terms of the Plan of Reorganization the holders of these First Mortgage Bonds were allotted \$19,716,040 of new Income Mortgage 4½% Bonds, \$29,574,060 of new 5% Preferred Stock and 230,593 shares of Common Stock taken at \$57 per share. The District Court breaks this down into percentages as follows:

“The first mortgage bonds are allotted new income mortgage bonds for 40% of the principal of their claim, new preferred stock for 60% of the principal of their claim and new common stock for 100% of their accrued interest, such common stock having been allotted at the price of \$57 per share.” (R. 10962, p. 70; *In re Western Pacific Railroad Company*, 34 Fed. Supp. 493.)

It is to be noted and emphasized at this point that the First Mortgage Bondholders received 230,187 shares of Common Stock out of an issue of 319,440 shares, leaving an authorized balance of 89,253 shares for creditors holding notes or obligations secured by the junior Refunding Mortgage. These shares at a value of \$62 per share represent \$5,534,186 of surplus

taken from the senior lienor and passed down to the junior lienor. (R. 10962, p. 72.)

The Railroad Credit Corporation total claim as of January 1, 1939, was \$2,455,616 together with \$146,563 of interest accrued and unpaid to that date. Under the terms of the Plan The Railroad Credit Corporation was allotted \$154,111 of Income Mortgage 4½% Series A Bonds, \$241,681 of 5% Preferred Stock, Series A, its proportionate share based on its proportion of Refunding Bonds of \$1,879,965 of cash and securities pledged under the Refunding Mortgage and 35,425 shares of Common Stock taken at the price of \$62, being part of the 89,253 shares not required to make whole the holders of the First Mortgage Bonds) (R. 10962, p. 72.)

In allotting these 89,253 shares representing \$5,534,186 of the First Mortgage trust estate which was not required in order to make whole and give full compensatory treatment to the holders of First Mortgage Bonds, the Interstate Commerce Commission made a division of these shares between the two junior creditors in the proportion that the pledged Refunding Bonds held by such creditor bore to the total amount of Refunding Bonds. This was explained by the Court as follows:

“RCC and ACJ are allotted new securities on the following basis: From the new securities, which the Commission finds are properly issuable in respect of the refunding mortgage bonds held as collateral for the RFC, RCC and ACJ bonds, are deducted that proportion of each class which the

principal amount of refunding mortgage bonds held by RFC as collateral bears to the total amount of pledged refunding mortgage bonds. The balance of such new securities is then divided between RCC and ACJ in proportion to the principal amounts of refunding mortgage bonds held by them respectively as collateral. The result is the allotment of common stock to RCC on its claim at the price of \$62 per share.” (R. 10962, p. 74.)

The fact that the figure \$62 was actually reached by the process above described seemed to have obscured the true issue in the mind of the learned Court. The true issue was not how the figure \$62 had been arrived at by the Commission but whether on the record as an entirety the figure was not equal to the true value of the stock. We think this true value is to be determined as follows:

Aside from \$2,750,050 of equipment obligations left undisturbed by the Plan, and \$10,000,000 Trustees Certificates held by Reconstruction Finance Corporation replaced under the Plan by \$10,000,000 New First Mortgage 4% Bonds, Series A, allotted to RFC, the secured creditors whose claims were found of value by the Interstate Commerce Commission were:

First Mortgage Bondholders	\$62,433,876.00
Reconstruction Finance Corporation	3,862,869.00
The Railroad Credit Corporation	2,590,924.11
A. C. James Company	6,249,750.00

(318 U. S. 455.)

To meet these claims the Commission in the Plan authorized and allocated the issue of new securities to these four secured creditors as follows:

(1) *First Mortgage Bondholders:*

Income 4½% Bonds	Face Value	\$19,716,040
5% Preferred Stock	“ “	29,574,060
Common Stock (no par)		
230,593 shares @ \$57		13,143,801

Total..... \$62,433,901

The value placed by the Commission on these new securities exceeded the claim of the bondholders by \$14.34.

(2) *RFC:*

Income 4½% Bonds	Face Value	\$1,185,200
5% Preferred Stock	“ “	1,777,800
Common Stock (no par)		
15,788 shares @ \$57		899,916

Total..... \$3,862,916

The value placed by the Commission on these new securities exceeded the claim of RFC by \$46.02.

(3) *Railroad Credit Corporation:*

Income 4½% Bonds	Face Value	\$ 154,111
5% Preferred Stock	“ “	241,681
Common Stock (no par)		
35,425 shares @ \$62		2,196,350

Total..... \$2,592,142

The value placed by the Commission on these new securities *exceeded the claim* of RCC by \$1,117.89.

(4) *A. C. James Co.:*

Income 4½% Bonds	Face Value	\$ 163,724
5% Preferred Stock	“ “	256,756
Common Stock (no par)		
37,635 shares @ \$62		2,333,370

Total..... \$2,753,850

The value placed by the Commission on these new securities is \$3,495,900 less than the A. C. James claim.

It is the contention of appellant that for the purpose of meeting and satisfying the claims of these creditors, the new securities must be taken and accepted by them *at the rates* and in the amounts fixed by the Commission. That is why, in subdivision R of the Plan, the Commission provided that:

“To the extent to which received prior to the issuance of new securities under the Plan, these payments under the Marshalling and Distributing Plan shall be applied in reduction of the Claim of the Railroad Credit Corporation *in respect of which* such new securities are to be issued *at the rates* provided in subdivision P.”

These payments were pledged directly by the debtor. The Commission's order required, and the District Court approved the construction, that when applied in reducing the amount of new securities offered in satisfaction of the RCC claim, it should be at the rate, \$62 per share, fixed by the Commission for the common stock.

It surely cannot be, that the same securities can be taken at one price where the rights of the debtor furnishing collateral are involved, and at another price where the rights of a third party, furnishing accommodation collateral, are involved.

The Commission was required by the law of the land to give full value to the property of the debtor in formulating a plan of reorganization. It was required to allocate new securities at prices which would reflect truly such value. In the opinion of the Supreme Court, that is precisely what it did. 318 U. S. 481.

If The Railroad Credit Corporation was not made whole and its claim satisfied by the new securities it was entitled to receive under the Plan, at the values fixed thereon by the Commission, then assuredly the claims of the First Mortgage Bondholders, first in priority, were not satisfied under the rules and according to the cases repeatedly cited by the opinion of the Supreme Court. If fluctuating market values may, as The Railroad Credit Corporation contends, be substituted for the values fixed by the Commission the entire Plan would be rendered unfair, unsound and invalid.

The secured notes held by The Railroad Credit Corporation were classified by the Court as constituting a separate class and were designated as class 5. By the terms of Section 77 The Railroad Credit Corporation then had power acting alone to reject the Plan and prevent it from being carried out unless after hearing the Court could make the special findings specified in

subsection (e) and set out below.* Late in 1943 the Plan was submitted for acceptance or rejection by secured creditors and was accepted by them “including the defendant Railroad Credit Corporation which took such action without asking the approval and consent of the Plaintiff as owner of the accommodation collateral hereinabove specified”. (R. 10966, pp. 4-5.)

III.

THE APPELLANT, THE WESTERN PACIFIC RAILROAD CORPORATION, IS ENTITLED TO THE RELIEF PRAYED IN ITS INDEPENDENT BILL OF COMPLAINT AGAINST THE RAILROAD CREDIT CORPORATION FOR THE REASON THAT IT HAS BEEN MADE WHOLE AND ITS CLAIM IS SATISFIED.

The first major premise of the appellant, The Western Pacific Railroad Corporation, is that The Railroad Credit Corporation has been made whole by resort to certain of the collateral pledged by The Western Pacific Railroad Company, the Debtor in the bankruptcy proceeding, and in consequence (a) the

*The pertinent provision is that the District Court may confirm a Plan of Reorganization which has not been accepted by the requisite percentages of the various classes of creditors to whom it has been submitted *only* “if he is satisfied and finds, *after hearing*—

i that it makes adequate provision for fair and equitable treatment for the interests and claims of those rejecting it;

ii that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and

iii that the plan conforms to the requirements of clause (1) to (3) inclusive of the first paragraph of this subsection (e).” (The italics and numbers *i*, *ii* and *iii* are not in the text and are inserted for emphasis and clarification.)

Debtor is entitled to the excess collateral to which The Railroad Credit Corporation has no further claim, and (b) the appellant, The Western Pacific Railroad Corporation, has been exonerated from all liability in the premises and its accommodation collateral must be restored together with cash thereon received after January 1, 1939, the effective date of the Plan of Reorganization.

We shall subdivide the foregoing major premise into its component parts and discuss each sub-proposition separately.

(A) The Railroad Credit Corporation has been made whole.

The allotments of new securities under the Plan of Reorganization are shown in Article VIII and IX of the Bill of Complaint of the appellant, The Western Pacific Railroad Corporation. (R. 10966, pp. 6-7.) These same figures appear in the Petition of the Reorganization Committee under Articles II and III. (R. 10962, pp. 72-84.) All securities of the Reorganized Company were allotted in reorganization to two groups of creditors—first: to holders of Bonds secured by the Debtor's First Mortgage; and second: to holders of Notes primarily secured by various items of collateral furnished by the principal Debtor including Bonds in varying proportions issued under the Debtor's Refunding Mortgage and secondarily secured by accommodation collateral furnished by the appellant, The Western Pacific Railroad Corporation.

Except for certain cash and securities of relative unimportance deposited under the Refunding Mort-

gage, the lien of the refunding Mortgage is *wholly* subordinate to the First Mortgage. (R. 10966, pp. 5-6.)

Accordingly under the rule of strict priority asserted and reasserted by the Supreme Court of the United States in *Boyd v. Northern Pacific Railroad Company*, 228 U. S. 482, *Consolidated Rock Products Company v. DuBois*, 312 U. S. 510 and *Group of Institutional Investors v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 318 U. S. 523, the holders of the First Mortgage Bonds must be made whole before any part of their exclusive trust estate may lawfully be taken from them and passed down to creditors secured by Bonds issued under the Debtor's subordinate Refunding Mortgage.

In making the holders of First Mortgage Bonds whole, the Plan allotted to each holder of First Mortgage Bonds—40% of the principal of their claim in new 4½% Income Bonds and 60% in 5% Preferred Stock and Common Stock for 100% of their accrued interest; such stock being allotted at the specified price of \$57 per share.

Since, under the decision of the Supreme Court in *Consolidated Rock Products Company v. DuBois*, *supra*, and many other cases, there is no legal distinction between principal and interest, each being equally and ratably secured by the First Mortgage, it is clear that the holders of First Mortgage Bonds are made whole by what was given them in new securities including Common Stock taken at the price

of \$57 per share for each \$100 of debt regardless of whether the debt be principal or accrued interest.

It must *not* be inferred, however, 'that the First Mortgage Bondholders are made whole when given the equivalent of 100% of the principal and interest upon their Bonds.

The Supreme Court repudiated that idea in its decision in *Consolidated Rock Products Company v. DuBois*, supra, where Mr. Justice Douglas said:

"True, the relative priorities are maintained. But the bondholders have not been made whole. They have received an inferior grade of securities, inferior in the sense that the interest rate has been reduced, a contingent return has been substituted for a fixed one, the maturities have been in part extended and in part eliminated by the substitution of preferred stock, and their former strategic position has been weakened. Those lost rights are of value. *Full compensatory provision must be made for the entire bundle of rights which the creditors surrender.*" (Our italics.)

This doctrine was reasserted with renewed vigor in the opinion written for the Supreme Court by the same Justice in *Group of Institutional Investors v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company* (318 U. S. 523, 569-570).

It is clear therefore that the First Mortgage Bondholders were entitled to receive the equivalent of 100% of the principal and interest represented by their First Mortgage Bonds and *in addition* were entitled to receive compensation (a) for surrendering

their first lien status and fixed interest bearing 5% Bonds not due until March 1, 1946, and (b) for surrendering their contract for interest at 5% between the effective date of the Plan, January 1, 1939, and the maturity of the Bonds in March, 1946. If the new Common Stock had been given to The Railroad Credit Corporation at the same rate or value assigned to it by the Interstate Commerce Commission in making whole the holders of the First Mortgage Bonds then The Railroad Credit Corporation would have been unduly enriched at least to the extent of \$5 per share on each share of the Common Stock received under the Plan.

Under the decision of the Supreme Court of the United States in this proceeding, we submit that it is *res adjudicata* (a) that the First Mortgage Bonds have been made whole by the allotment of new securities including Common Stock taken at \$57 per share; and (b) that they have received adequate compensation for the entire bundle of their rights which they surrendered under the Plan and that the only compensation that can be spelled out for the surrender of their senior rights was the allotment of the Common Stock at \$5 per share below its actual value; otherwise it would have been necessary for the Supreme Court to reverse the case as it did at the same time reverse the companion case of *Group of Institutional Investors v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, supra. At the risk of repetition we again ask this Court to note that that case was reversed by the Supreme Court and remanded to the

Commission to “determine what the General Mortgage Bonds should receive *in addition* (our italics) to the face amount of inferior securities equal to the face amount of their old ones as equitable compensation, qualitative for quantitative, for the loss of their senior rights”. (Per Mr. Justice Douglas, at p. 571.)

The additional compensation which it was necessary to give to the First Mortgage Bondholders but to which the junior creditors were not entitled explains the \$5 differential in the price of the same Common Stock allotted to The Railroad Credit Corporation. Nor do we understand that The Railroad Credit Corporation questions this. Their basic argument is that while the First Mortgage Bondholders are made whole in law by the allotment to them of Common Stock at \$57 per share, they are not made whole in fact, because the new Common Stock does not or did not sell at \$57 per share. They do not urge that the differential of \$5 is not a fair allowance to the First Mortgage Bondholders for the sacrifice of their senior position.

(B) The Interstate Commerce Commission recognized that The Railroad Credit Corporation had been made whole.

As we have already pointed out one of the direct consequences of making The Railroad Credit Corporation whole was the release and discharge of the excess collateral which had been pledged by the Debtor. (*Peter A. Frasse & Co. v. Hartford Automotive Parts Co.*, 300 Fed. 876.) This was recognized by the Interstate Commerce Commission, which expressly provided that all moneys received under the Marshalling

and Distributing Plan between January 1, 1931 and the effective date of the Plan (an assignment of which was part of the collateral pledged by the Debtor) should be credited to the Debtor, and the new securities issuable to The Railroad Credit Corporation should be ratably reduced. Thus it is alleged in the separate Bill of Complaint "that inasmuch as the defendant, The Railroad Credit Corporation, had been made whole by the allocation of the above securities (a) without resorting to pledged interest of the Railroad Company or its subsidiaries under the Marshalling and Distributing Plan paid subsequent to the effective date of the Plan and prior to the issue of the new securities or (b) without resorting at all to the accommodation collateral, *provision was made in the Plan* that the amount of the claim of the defendant, The Railroad Credit Corporation, should be *reduced* by the amounts received under the Marshalling and Distributing Plan between those dates". It is true that The Railroad Credit Corporation has complained of this provision of the Plan (but not until it had voted for the Plan and all essential steps had been taken for the issue and delivery of the new securities) and its complaint has been submitted to the District Court for determination under Article V of the Plan and has been determined adversely to it. This determination, unless Article V does not mean what it says, is final and conclusive. We think that in making such a determination the Court acts as an arbitrator and not as a judge and his determination being non-judicial is non-appealable. Nor should it be appealable. At the stage of the reor-

ganization proceeding which is reached when a provision such as Article V is invoked the delay occasioned by an appeal would in nine cases out of ten be fatal to the Plan. But we think it quite clear, as the Reorganization Committee are prepared to show, that the Court's determination was correct and unless the appeal of The Railroad Credit Corporation is dismissed the Court's determination should be affirmed.

(C) The Railroad Credit Corporation is estopped to deny that it has been made whole.

In reaching the conclusion that The Railroad Credit Corporation has been made whole under the Plan, we are fortified by the circumstance that The Railroad Credit Corporation, based upon what it has done rather than what it has said and is saying, has itself recognized and is estopped now to deny that it has been made whole. If The Railroad Credit Corporation itself had not recognized that it was being made whole in law and in fact under the Plan by resort to collateral supplied by the Debtor, it was manifestly its duty to communicate its doubt on that vital point to the owner of the accommodation collateral and secure its instructions as to whether to vote for or against the Plan of Reorganization. The consequence of its disregard of the rights of the owner of the collateral are two-fold: (i) it is estopped to deny that it has been made whole and its claim discharged and (ii) it released the surety regardless of whether it was or was not made whole. The release of the surety will be discussed separately at a subsequent point.

(D) The accommodation collateral has been exonerated from all liability and should be restored together with all cash thereon received by The Railroad Credit Corporation.

By the same rule which requires the excess collateral pledged by the Debtor to be released from the pledge when the creditor has been made whole, the accommodation collateral against which recourse may be had only in the event that the Debtor's own collateral is exhausted must likewise be released. This is a rudimentary principle of the law of suretyship to which all will agree without elaboration or further elucidation and without citation of authority. The following may, however, be consulted:

49 *Corpus Juris*, 982, 986;

Commercial National Bank v. National Surety Company, 259 N. Y. 151;

Matter of Cooke, 147 Misc. 528;

Robinson v. Roe, 233 Fed. 936;

Peter A. Frasse & Co. v. Hartford Automotive Parts Co., 300 Fed. 876.

Why the learned District Court thought this principle inapplicable here has not been made clear. The District Court seems to have said in substance: The holders of the Debtor's First Mortgage Bonds have been made whole and have received full compensatory treatment by resort to and use of only a *part* of the very ample trust estate that was pledged as security for the payment of their debt; and so the Court has taken what remained—an item of \$5,534,186—and given it to the junior secured creditors; the District Court has made this distribution of senior security to the junior creditors by allotting to them the same

Common Stock that was given to the First Mortgage Bonds at \$57 per share. The allotment of the new Common Stock to the better secured of the two junior secured creditors was made at the same basic price after allowing \$5 per share additional as compensation for their surrendered seniority which the junior creditors did not enjoy; but the making whole of the First Mortgage Bondholders was a mere legal fiction which may not be extended to a junior creditor so as to prevent the junior creditor from enriching himself further at the expense of an accommodation surety who, strange as it may seem, has always been favored in a court of equity.

We submit with all possible respect to the learned District Court that there is something fundamentally wrong in a system of jurisprudence which permit itself to be tied in knots and strangled by fiction of that character.

IV.

THE APPELLANT, THE WESTERN PACIFIC RAILROAD CORPORATION, IS ENTITLED TO THE RELIEF PRAYED IN ITS INDEPENDENT BILL OF COMPLAINT AGAINST THE RAILROAD CREDIT CORPORATION FOR THE REASON THAT ITS ACCEPTANCE OF THE PLAN OF REORGANIZATION WITHOUT THE CONSENT OF THE WESTERN PACIFIC RAILROAD CORPORATION RESULTED IN A FUNDAMENTAL CHANGE IN THE COLLATERAL PLEDGED BY THE PRINCIPAL DEBTOR.

It is a fundamental principle of the law of suretyship that the surety (in which category an accommodation endorser or the depositor of accommodation

collateral indubitably belongs) is entitled to have the engagement of the principal Debtor preserved without variation or alteration of its terms or status and that the consent of the surety to any such change is essential if his obligation likewise is to be preserved. (Negotiable Instrument Law of New York, Article X, Sec. 201; *The National Park Bank of New York v. Kohler*, 204 N. Y. 174; *Wright v. North River Ins. Co.*, 23 Fed. (2d) 548.)

The Railroad Credit Corporation violated this elementary principle when without consultation with or the consent of The Western Pacific Railroad Corporation it voted to accept the Plan of Reorganization.

The Plan of Reorganization which resulted in a fundamental change in the collateral pledged with The Railroad Credit Corporation by the principal Debtor was not submitted to creditors for acceptance or rejection until the fall of 1943, and under the terms of Section 77 it could not be carried out by the Court against an adverse vote by The Railroad Credit Corporation unless the Court granted a new hearing, which would have permitted the introduction of evidence of the vast economic changes that had occurred after September 19, 1939, when the Commission made the findings upon which the Plan was based. At a hearing on confirmation after an adverse vote by The Railroad Credit Corporation, it could easily have been shown that by reason of the changes in the money market and the rates for the hire of money secured by senior railroad liens the First Mortgage Bondholders could have been made whole by the allotment of new

securities bearing interest rates as low as 3% instead of 4½% and 5% as provided in the Plan and for that reason alone even under the low capitalization permitted by the Interstate Commerce Commission it would have been possible to pay off in cash all of the junior creditors. Under these circumstances it would be grossly inequitable to permit The Railroad Credit Corporation to claim that it has not been made whole and to secure recoupment for a theoretical loss through seizure and appropriation of the accommodation collateral.

V.

THE RIGHT OF APPELLANT, THE WESTERN PACIFIC RAILROAD CORPORATION, TO FULL RELIEF UNDER ITS INDEPENDENT BILL OF COMPLAINT AGAINST THE RAILROAD CREDIT CORPORATION IS NOT DEFEATED BY THE ACTION OF THE DISTRICT COURT IN PROCEEDING 26591-S.

As already stated the appellant, The Western Pacific Railroad Corporation, desires a decision on the merits but respectfully submits that the District Court was without authority or jurisdiction to determine the question in the proceeding 26591-S which is under Section 77 of the National Bankruptcy Act.

We fail to understand how either the Reorganization Committee or the learned District Court assumed that the subject was cognizable under Article V of the Plan of Reorganization in view of the express provision of subsection (a) of Section 77 which limits the jurisdiction of the District Court "to the Debtor and its property" and excludes the Court from juris-

diction over property other than that of the Debtor and (b) the express determination by the Supreme Court of the United States in this very proceeding that "the plan does not deal with any possible claim of accommodation pledgors against pledgees of bonds which were not the property of the debtor" and that the collateral, other than refunding bonds, was therefore "left with the pledgees with its position unaffected by any direct action of the Commission".

Of course, if these rights were not dealt with in the Plan, the District Court is powerless to adjudicate them under special authority given him by Article V to construe the Plan. This point is one of substance. Orders of Court under Article V are "final and conclusive" and hence not appealable. The parties to the Plan have agreed to this stipulation in Article V which is the equivalent of a valid agreement not to appeal from any determination of the Court made under that Article of the Plan. But The Western Pacific Railroad Corporation is not a party to the Plan and cannot lawfully be required to submit to an arbitration made under its provisions. We therefore think that the order of the Court in No. 26591-S should be reversed, as relating to a subject not embraced in that Article, and the full relief as prayed should be granted the plaintiff under the independent Bill of Complaint.

But assuming for argument that the Court might determine this controversy under Article V, we think it equally clear that the conclusion which the Court reached was erroneous.

That the learned District Court totally misconceived the case seems to us to be shown by the following statement in the Court's amended Opinion which we have broken down into four parts for convenience of analysis:

(i) "The Western Pacific Railroad Corporation is attempting to do what the Supreme Court said could not be done by the plan."

(ii) "If the Railroad Credit Corporation were in the position of the A. C. James Co. and would receive securities of the face value of less than half the amount of its claim, it could not be contended that the acceptance of the most that could be allotted to it from the assets of the debtor under the plan would release any outside collateral which it might hold."

(iii) "It follows that if the market value of the securities is much less than their face value, as contended by the Railroad Credit Corporation, and it will not be able to realize thereon enough to satisfy its claim, it is not made whole nevertheless by the allotment to it of securities of a face value approximating the amount of its claim, as contended by the Western Pacific Railroad Corporation."

(iv) "As a junior claimant it has consented to accept from the debtor's estate as much as it has been found entitled to. There is no presumption that it has been made whole. It is fortunate enough to have outside collateral against which it can proceed if the estate of the debtor cannot satisfy the claim."

- (i) **The Western Pacific Railroad Corporation** is attempting to do what the **Supreme Court** said could not be done by the **Plan**.

We think this clearly to be a misconception. The appellant is attempting to do by independent suit what the **Supreme Court** said was not done by the **Plan** and could not be done by the **Bankruptcy Court**. But in the independent suit the determination by the **Interstate Commerce Commission**, affirmed by the **District Court**, that **The Railroad Credit Corporation** was made whole without even resorting to all of the collateral pledged by the principal debtor is a conclusive determination that the accommodation collateral has been discharged.

- (ii) **If The Railroad Credit Corporation** were in the position of the **A. C. James Co.** and would receive securities of the face value of less than half the amount of its claim, it could not be contended that the acceptance of the most that could be allotted to it from the assets of the debtor under the plan would release any outside collateral which it might hold.

We quite agree that the **A. C. James Co.**, *unlike The Railroad Credit Corporation*, has not been made whole by resort to the collateral pledged by the principal debtor, and in its case, if there had been a pledge of accommodation collateral, it might have had recourse against such collateral. It does not logically follow that **The Railroad Credit Corporation**, not being obliged to exhaust the collateral furnished by the principal debtor, may nevertheless resort to accommodation collateral.

- (iii) It follows that if the market value of the securities is much less than their face value, as contended by The Railroad Credit Corporation, and it will not be able to realize thereon enough to satisfy its claim, it is not made whole nevertheless by the allotment to it of securities of a face value approximating the amount of its claim, as contended by The Western Pacific Railroad Corporation.

There is here an obvious factual misunderstanding on the part of the District Court. The Railroad Credit Corporation was made whole by an allotment of certain securities, including Common Stock which had no face value at all. But the Interstate Commerce Commission determined, and the District Court affirmed the determination, that the First Mortgage Bonds *would* be made whole, plus full compensation for their surrender of seniority by an allotment of Common Stock without par value taken at a value of \$57 per share, and that the Railroad Credit Corporation, possessing no senior rights, would be made whole by an allotment of the same stock at \$62 per share and without resorting to all of the collateral pledged by the principal debtor.

- (iv) As a junior claimant it has consented to accept from the debtor's estate as much as it has been found entitled to. There is no presumption that it has been made whole. It is fortunate enough to have outside collateral against which it can proceed if the estate of the debtor cannot satisfy the claim.

We agree that there is no presumption that The Railroad Credit Corporation has been made whole, and we rely on no such presumption. Our reliance is upon the facts of record as hereinbefore recited, which conclusively prove that The Railroad Credit

Corporation has been made whole as a matter of law, and that for this reason and for other reasons stated above, the pledged accommodation collateral has been discharged from any and all liability and should be restored to its rightful owner, together with cash received thereon by The Railroad Credit Corporation subsequent to January 1, 1939.

All of which is respectfully submitted.

Dated, Oakland, California,

April 16, 1945.

THE WESTERN PACIFIC RAILROAD CORPORATION,

By LEROY R. GOODRICH,

Its Attorney.

F. C. NICODEMUS, JR.,

Of Counsel.

No. 10962

United States
Circuit Court of Appeals
For the Ninth Circuit

THE RAILROAD CREDIT CORPORATION,
a Corporation,

Appellant,

vs.

FREDERICK H. ECKER, FRANK C. WRIGHT and
ROBERT E. COULSON, the members of the Reor-
ganization Committee of the Western Pacific Railroad
Company, Debtor,

Appellees,

and

THE WESTERN PACIFIC RAILROAD CORPORA-
TION, a Corporation,

Appellant,

vs.

THE RAILROAD CREDIT CORPORATION,
a Corporation,

Appellee.

Opening Brief of The Railroad Credit Corporation
as Appellant Upon Its Appeal

FILED

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All emphasis by use of bold face type is ours.

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United States
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Appellee.

Opening Brief of The Railroad Credit Corporation
as Appellant Upon Its Appeal

I.

STATEMENT AS TO PREPARATION AND PRINTING
OF RECORD AND REFERENCES TO IT

This is an appeal from part of an order of the District
Court (II-R 143) construing certain provisions of the plan
of reorganization of The Western Pacific Railroad Com-

pany, a railroad corporation debtor in reorganization under §77 of the Bankruptcy Act (47 Stat. 147, c. 204, as amended; 11 U.S.C.A. §205). The Interstate Commerce Commission, after extended proceedings, certified a plan of reorganization to the District Court (*Re Western P. R. Co. Reorganization*, 230 Inters. Com. Rep. (F) 61; 233 Inters. Com. Rep. (F) 409; 236 Inters. Com. Rep. (F) 1; I-R 194, 300, 884). The District Court approved the plan (*Re Western P. R. Co.*, 34 F. Supp. 493, 43 Am. Bnkr. Rep. (NS) 328; I-R 1569). From that order appeals were taken to this Court. In this Court the matter was entitled and numbered: "In the Matter of the Western P. R. R. Co., Debtor—Western P. R. R. Corporation, a corporation, et al., Appellants, vs. Institutional Bondholders' Committee, et al., Appellees.", No. 9714.¹ The record was long. Printed copies of it are in the files of this Court. It is herein referred to as "I-R".

This Court reversed the District Court (124 F.2d 136).² On certiorari the Supreme Court reversed this Court and affirmed the District Court. (*Ecker v. Western Pacific R. R. Corporation, and companion cases*, 318 U.S. 448, 87 L.ed. 892; the Mandate is at II-R 63).

On going down of the Mandate (directed to the District Court) and on May 9, 1944, the Reorganization Committee under the plan of reorganization, filed a petition for construction of portions of the plan (II-R 69). After a hearing (II-R 109-143) the District Court responded with its

1. The opinion of this Court is reported as *In re Western Pac. R. Co.*, 124 F.2d 136.

2. The grounds have no direct bearing upon the matters presented on these appeals. But had this Court been sustained the present controversy could not have arisen.

corrected memorandum opinion (II-R 98) and its order of September 14, 1944, construing the plan of reorganization (II-R 143). The pending appeals are taken from portions of this order.

Much of the matter which should be before the Court on the pending appeals is contained in the record on the earlier appeals, No. 9714 in this Court. To shorten the record on these appeals and save duplication, this Court made its order that on inclusion of a copy of that order in the record of these appeals there need not be included any matter already in the record in No. 9714, and that such matter should be deemed part of our record on these appeals. A copy of that order was included in our record (II-R 178).

On the filing of the original certified record this Court made its order of January 10, 1945, that it should not be necessary again to print matter appearing in the record in No. 9714; that the parties might refer to the record in No. 9714 as part of the record on these appeals (II-R 200).

Accordingly, the record on these appeals is physically contained in two places, (1) in the record on appeal in No. 9714 in this Court, and (2) in the printed record on these appeals—No. 10962 in this Court. Matter in the record on the earlier appeals, No. 9714 in this Court, will be referred to by arabic numerals designating page preceded by “I-R”; matter contained in the printed record on these appeals No. 10962 in this Court, will be referred to by arabic numerals designating page preceded by “II-R”.

JURISDICTION

The pleadings and facts disclosing the basis on which it is contended that the District Court had jurisdiction appear above in Part I of this Brief, and in Part IV (p. 26 below). The jurisdiction of the District Court is sustained by §77 of the Bankruptcy Act (47 Stat. 147, c. 204 as amended, 11 U.S.C.A. §205, particularly subdivisions (a), (f) and (l)), and the consent of the Interstate Commerce Commission and reservation of jurisdiction in Paragraph V of the Plan of Reorganization (I-R 399).³ (See also Bankruptcy Act §2a(7)(8)(15), 11 U.S.C.A. §11a(7)(8)(15)).

The decree appealed from was made and filed September 14, 1944 (II-R 143). No notice of its rendition or filing was given. The Railroad Credit Corporation notice of appeal was filed October 13, 1944 (II-R 149, 150), and pursuant to order of the Court made on October 14, 1944, a cost bond on appeal was filed on October 14, 1944 (II-R 154-157). The jurisdiction of this Court to entertain this appeal is sustained by Bankruptcy Act §§77(a)(1), 24, 25, 11 U.S.C.A. §§77(a)(1), 47, 48; Jud. Cod. §128(c), 28 U.S.C.A. §225(c). (See also General Orders in Bankruptcy, 49(2), 36.)

3. This provision of the Plan of Reorganization was set out in the Petition of the Reorganization Committee (II-R 69) and reads as follows: "V. The construction of the Plan by the Court shall be final and conclusive. The Court may cure any defect, supply any omission, or reconcile any inconsistency in such manner and to such extent as may be necessary or expedient in order to carry out the Plan effectively."

III.

STATEMENT OF THE CASE

Background of the present proceedings

The background of the present proceedings can best be stated, shortly and authoritatively, by quotation from the opinion of the Supreme Court⁴ (318 U.S. 448, 453-456, 87 L.ed. 892, 920-923).⁴ (Some of the court's foot notes have been omitted and the foot note references and foot notes are ours unless otherwise indicated.⁵)

"The debtor railroad company filed its petition in the District Court for the Northern District of California on August 2, 1935, alleging its inability to pay and discharge its indebtedness as it matured and praying for reorganization under §77. The petition was approved as properly filed, trustees were appointed, their appointment ratified, 207 Inters Com Rep (F) 793, and the appropriate steps taken to bring the plan of reorganization before the Commission for consideration. Public hearings were held by the Commission at which other plans for reorganization were filed, one by a group of bondholders known as the Institutional Bondholders Committee and one by the A. C. James Company, a secured creditor of the debtor which also was financially interested in the treatment accorded

4. The statement of the Supreme Court, though shorter, follows substantially the statement of facts by the District Court (34 F.Supp. 493; I-R 1569 et seq.). The Supreme Court itself notices that "there is little if any dispute concerning the primary facts."

From the opinion of the District Court it appears that a pre-trial conference was had. "At the conference the parties agreed upon substantially all the facts upon which depend the decision of the issues raised by the objections and claims for equitable treatment, and, accordingly, on December 20, 1939, filed a 'Stipulation as to Facts Not in Dispute'."

The stipulation as to facts not in dispute will be found in I-R 1017 et seq. By order of the Court it was made part of the record (I-R 1273) and it was received in evidence on the hearing in the District Court (I-R 1285).

5. The second footnotes numbered 5 and 6 below and not appearing in ordinary sequence are part of the Supreme Court's opinion and not our footnotes.

the preferred and common stock of the debtor. After full consideration of the problems of the debtor's reorganization and after the development of a plan deemed in accordance with §77, the Commission certified its plan to the District Court on September 28, 1939.⁶

“The Commission's conclusions and orders were reached upon exceptions to the report of its Bureau of Finance. Its plan was the outgrowth of a study of the financial condition and economic situation of the debtor, viewed in the setting of the public interest in a national transportation system. The competing claims of the various classes of creditors and stockholders were appraised in the light of the requirements of the Act that they be accorded fair and equitable treatment. There is little if any dispute concerning the primary facts from which factual or legal inferences are to be drawn.⁷

“The debtor is a California corporation with its principal operating office in San Francisco. It carries on an interstate railroad business between the States of California, Nevada and Utah. For an understanding of this opinion the obligations of the debtor as of January 1, 1939, the date proposed for the beginning of the operation of the plan, may be stated as follows:⁸

6. The steps and proceedings before the Commission are outlined in more detail in the opinion of the District Court, in considerable detail in the Stipulation as to Facts Not in Dispute (I-R 1018 et seq.) and, of course, the proceedings themselves appear in full in I-R, the record in No. 9714.

7. See footnote 4 above.

8. The figures which follow are the same as those used by, and which appear in, the opinion of the District Court (34 F.Supp. 493, 497; I-R 1576). The figures are the same as those appearing in the opinion of this Court (124 F.2d 136, 137) except [1] that this Court carried its figures to the nearest even dollar, and except [2] as to the figure for accrued interest on The Railroad Credit Corporation note, where this Court used a slightly larger figure than that used by the District Court, noticed the difference and stated that it was using the Commission's figures. Since this affects only the unsecured portion of the Railroad Credit Corporation claim, the difference is not material, as will appear.

"Claim or interest"	Principal of claim or interest	Accrued interest at contract rate to effective date of plan	Total claim including interest at contract rate to effective date of plan
Trustees' certificates (held by Reconstruction Finance Corporation)	\$10,000,000.00	\$ —	\$10,000,000.00
Equipment obligations.....	2,750,050.00	94,202.00	2,844,252.00
First Mortgage 5% Bonds.....	49,290,100.00	13,143,776.66	62,433,876.66
Reconstruction Finance Corporation Collateral Notes (secured by \$10,750,000 General and Refunding Mortgage Bonds and other collateral*)	2,963,000.00	899,869.98	3,862,869.98
The Railroad Credit Corporation Collateral Notes (secured by \$4,000,000 General and Refunding Mortgage Bonds and other collateral*)	2,445,609.88	145,314.23	2,590,924.11
A. C. James Co. Collateral Notes (secured by \$4,249,500 General and Refunding Mortgage Bonds)	4,999,800.00	1,249,950.00	6,249,750.00
Total secured debt.....	\$72,448,559.88	\$15,533,112.87	\$87,981,672.75
Unsecured Claims.....	5,818,791.00		
Preferred Stock.....	28,300,000.00		
Common Stock	47,500,000.00		
	\$154,067,350.88		

"*The 'other collateral' does not belong to the debtor and is unaffected by the plan. See p. 503 [L.ed. p. 947], *infra*.

"Payment of this indebtedness was secured by liens, collateral or priority, as follows:

9. The "other collateral" held by the Railroad Credit Corporation is stated in note (b) in the opinion of the District Court (34 F.Supp. at 497; I-R 1577). That footnote reads as follows:

"(b) The notes held by RCC are secured by the pledge of \$2,000,000, principal amount, of refunding mortgage bonds, series A, and \$2,000,000, principal amount, of refunding mortgage bonds, series B, of which \$2,000,000, principal amount of series A bonds were repledged with it by ACJ. In addition, such notes are secured by a second lien on all the securities pledged with RFC; by a first lien on the Debtor's distributive share in the fund established by the marshaling and distributing plan, 1931; by a first lien on the advances from WP Corp to the Debtor in the sum of \$5,494,722; by a lien on the advances made by WP Corp to Standard Realty and Development Company in the sum of \$120,000; and by a lien on the advances made by WP Corp to Sacramento Northern Railway in the sum of \$856,260, subject, as to the Sacramento Northern advances, to any and all rights and claims in respect thereof, if any, of the trustees or the holders of first mortgage bonds."

“The trustees’ certificates of \$10,000,000 are secured by a lien on the entire estate and priority over all claims beyond reorganization expenses.

“The equipment obligations of \$2,750,050 are secured by rolling stock, acquired free of the liens of mortgages, through direct liens or trust arrangements. No one disputes the sound character of any of these securities. They are given priority over the fixed obligations of the reorganized company.

“Subject to the trustees’ certificates and equipment obligations, the first mortgage 5% bonds of \$62,433,876.66, face and interest to the effective date of the plan, are secured by prior liens on all valuable property of the debtor, except (1) money, accounts, operating balances and cash items and (2) certain assets, referred to in the next paragraph, upon which the general and refunding bonds have a first lien, deemed by the Commission to be of value sufficient to support \$732,010 of new income mortgage bonds and new preferred stock of \$1,147,955 par. The total face and assumed value of the securities authorized by the plan, as evidence of the entire value of the system, is \$84,000,000 plus. See page 481 [L.ed. p. 936], *infra*. This paragraph reflects our conclusions as to priorities of the liens of the respective mortgages later discussed. See *Priorities of Conflicting Liens*, page 489 [L.ed. p. 940], *infra*.

“The later general and refunding mortgage bonds, \$18,999,500 in face amount, are secured by a first lien on properties determined by the Commission to be of a value and earning power sufficient to support issues of new

income bonds and participating preferred stock of \$732,010 and \$1,147,955, respectively. See 233 Inters Com Rep (F) 414, et seq. They are further secured, subject to the prior rights and other exceptions of the obligations listed in the preceding paragraphs, by a lien on all valuable property of the debtor. All of this series which were issued are pledged to secure the collateral notes in the amounts indicated in the preceding table.”

The Supreme Court next reviews facts bearing upon the questions of value and the character and amount of new securities which would be supported and which properly should be issued,¹⁰ states the conclusions of the plan as to securities to be issued and continues (318 U.S. at 460, 461, 87 L.ed. at 925):

“In view of the foregoing limitation, capitalization of the reorganized company was fixed at \$2,750,050 of undisturbed equipment obligations, \$10,000,000 of first mortgage 4% bonds, \$21,219,075 of income mortgage 4½% bonds, \$31,850,297 of 5% preferred stock, and 319,441

10. The heart of this discussion is the anticipated earnings of the debtor, the fixed demands on those earnings, and the capital structure that the earnings would support.

shares of common stock without par value.⁵ These issues of preferred and common were based upon possible earnings in addition to the \$2,000,000 plus. These securities were allotted by the Commission upon consideration of 'the relative priority, value, and equity of the various claims and the value of the new securities available in exchange therefor,' as follows:⁶

"5. 233 Inters Com Rep (F) 409, 413; 236 Inters Com Rep (F) 1, 4. This is summarized by a petitioner as follows:

<i>Title of Issue</i>	<i>Presently to be issued</i>	<i>Annual Charges</i>
Undisturbed existing equipment obligations.....	\$ 2,750,050	\$ 94,202
First Mortgage 4% Bonds, Series A, due January 1, 1974	10,000,000	400,000
Total annual fixed charges.....		\$494,202
Mandatory Capital Fund.....		500,000
Income Mortgage 4½% Bonds, Series A, due Janu- ary 1, 2014. Interest cumulative to 13½%, other- wise noncumulative. Convertible at the option of the holder into new Common Stock at the price of \$50 per share.....	\$21,219,075	954,858
Total funded debt.....	\$33,969,125	
Total annual charges (fixed and contingent) and Capital Fund.....		\$1,949,060
Income Mortgage Sinking Fund (½%).....		106,095
Participating 5% Preferred Stock (\$100 par value)...	31,850,297	1,592,515
Total securities with par value.....	\$65,819,422	
Total annual charges, Capital Fund, and Preferred dividend requirements.....		\$3,647,670
Common Stock (without par value).....	319,441 shs."	

(Supreme Court footnote. The table is substantially the same as one in the opinion of the District Court, 37 F.Supp. at 496; I-R 1575. There is no difference as to figures.)

"6. The applicable portion of the finding is as follows:

"(1) First-mortgage bondholders, \$19,716,040 of income-mortgage bonds, \$29,574,060 of preferred stock, and 230,593 shares of common stock, the common stock to be taken at the price of \$57 a share; (2) Finance Corporation, \$1,185,200 of income-mortgage bonds, \$1,777,800 of preferred stock, and 15,788 shares of common stock, the common stock to be taken at a price of \$57 a share; (3) Credit Corporation, \$154,111 of income-mortgage bonds, \$241,681 of preferred stock, and 35,425 shares of common stock, the common stock to be taken at a price of \$62 a share; and (4) James Company, \$163,724 of income-mortgage bonds, \$256,756 of preferred stock, and 37,635 shares of common stock, being the amount of common stock which bears to the amount of common stock allotted to the claim of the Credit Corporation the same proportion that the principal amount of general and refunding bonds of the debtor held by the James Company as collateral for its claim bears to the principal amount of such bonds held by the Credit Corporation for its claim.' The result of the distribution per dollar of indebtedness is set out in the Commission's reports. 230 Inters Com Rep (F) 101 and 233 Inters Com Rep (F) 417 and 451." (Supreme Court footnote). This is **not** an exact quotation of the Plan of Reorganization. (See subdivision P quoted at p. 26 below.)

	New First Mortgage 4% Bonds Series A	New Income Mortgage 4½% Bonds Series A	New 5% Preferred Stock Series A (\$100 Par)	New Common Stock (No Par)
“First Mortgage 5% Bonds..... (\$62,433,876.66)		\$19,716,040	\$29,574,060	230,593 shs.
RFC (In exchange for Trustees’ Certificates of \$10,000,000 and Collateral Notes of \$3,862,869.98)	\$10,000,000	1,185,200	1,777,800	15,788 shs.
RCC Collateral Notes..... (\$2,590,924.11)		154,111	241,681	35,424 shs.
ACJ Collateral Notes..... (\$6,249,750)		163,724	256,756	37,635 shs.
Total.....	\$10,000,000	\$21,219,075	\$31,850,297	319,441 shs.’’

The basis of this allocation is given below at page 18 and following. It is now necessary to notice in more detail the position of The Railroad Credit Corporation.

The position of The Railroad Credit Corporation

The table at p. 7 above and the stipulation as to facts not in dispute show that the Debtor had issued \$18,999,500 principal amount of General and Refunding Mortgage Bonds. These bonds were a first lien on certain of the assets of the Debtor (318 U.S. 448, 489, et seq., 87 L.ed. 892, 940, et seq.). None of these were issued except by way of pledge as collateral to secure loans made by the A. C. James Co., Reconstruction Finance Corporation and The Railroad Credit Corporation (I-R 1022, 1023).

To secure its indebtedness to the A. C. James Co. the Debtor pledged to the A. C. James Co. \$6,249,500 principal amount of its General and Refunding Bonds (I-R 1023). To secure advances from Reconstruction Finance Corporation principal and interest totaling \$3,862,869.98, the Debtor pledged \$10,750,000 principal amount of its General

and Refunding Bonds (see table p. 7 above). The Railroad Credit Corporation acquired certain rights in respect of both the bonds pledged to James Co. and bonds pledged to Reconstruction Finance Corporation.

The claim of The Railroad Credit Corporation was secured in various ways. The security it held was as follows:¹¹

(1) \$4,000,000 of General and Refunding Bonds of the Debtor. Of these \$2,000,000 were pledged directly by the Debtor and \$2,000,000 were bonds originally pledged by the Debtor to the James Co. and repledged by the James Co. with The Railroad Credit Corporation (I-R 1023, 1025; see note 9 above).

(2) "A second lien upon all of the securities pledged with the Reconstruction Finance Corporation as collateral security", i.e., a second line on the \$10,750,000 principal amount of General and Refunding Bonds pledged to Reconstruction Finance Corporation as noticed above (I-R 1025; see note 9 above).

(3) "A first lien on Debtor's distributive share in the fund established under The Marshaling and Distributing Plan, 1931"¹² (I-R 1025; see note 9 above).

(4) A first lien on certain advances made by The Western Pacific Railroad Corporation to the Debtor and to subsidiaries of the Debtor (I-R 1025; see note 9 above).

The question on this appeal turns on the place occupied by, and what is to be done with, (3) above, i.e., "the Debtor's distributive share in the fund established under The Marshaling and Distributing Plan, 1931". A copy of this Marshaling and Distributing Plan, 1931, appears as an exhibit an-

11. See note 9 above.

12. Is this a "lien" or a contractual right of set-off?

nexed to the claim of The Railroad Credit Corporation filed in the reorganization proceeding (II-R 5-43). The Plan arose out of a proceeding before the Interstate Commerce Commission, "Fifteen Per Cent Case, 1931, Ex Parte No. 103—In the Matter of Increase in Freight Rates and Charges".

This is the crux of the Marshaling and Distributing Plan, 1931 (II-R 10 et seq.): The railroads had applied for a horizontal increase in freight rates. This was needed for the financially weak roads, and, of course, would substantially increase the earnings of the strong roads. As a result of the rulings of the Interstate Commerce Commission, a pooling arrangement was established, which is known as the Marshaling and Distributing Plan, 1931. Under this Plan carriers which contributed to the fund created thereby were eligible to file applications for loans to meet their fixed interest obligations. When made, these loans were secured by the best available collateral. The Railroad Credit Corporation was incorporated as the agency through which the Plan would operate. The roads participating in the Plan made contributions to a fund held and administered by The Railroad Credit Corporation. "The amount to be paid into the fund, by each of the participating carriers, shall be the gross revenue received by it from the increase of rates scheduled by the Commission", less certain amounts on account of taxes. The Railroad Credit Corporation was to use the fund so provided "to carry out the Commission's purpose to prevent, so far as practicable, defaults by railroad companies in their fixed interest obligations". To that end the Corporation, on application of a participating eligible carrier, would make loans from the funds to enable the carrier to meet its fixed interest obligations. The Corporation was to take as se-

curity the best available collateral, including, if required by the Corporation, the pledge "of the amounts due or to become due an applicant on distribution as provided" in the Plan.¹² The directors of the Corporation were to review its needs, and if they found a balance on hand above requirements, "such balance shall be distributed to the participating carriers in the proportion in which their respective earnings * * * contributed to the fund, **except that any distributable amount inuring to a carrier indebted to the fund, instead of being paid to it, shall be credited on its obligation**"'.¹³

In pursuance of the Plan, The Railroad Credit Corporation was incorporated and The Western Pacific Railroad Company, the Debtor, became a participating carrier and made contribution. The contributions of the Debtor and its subsidiaries, and the right of the Debtor and its subsidiaries to receive distribution, were treated as a unit.

The notes of the Debtor were given under the Plan. The Debtor made applications for loans and received two loans, one in the principal amount of \$1,303,000, evidenced by its note of June 29, 1932 (II-R, 44-51) and one in the principal amount of \$1,293,439, evidenced by its note of March 25, 1933 (II-R 52-59). (See also I-R 1056, 1057.) These notes, in addition to stating the principal obligation and the obligation to pay interest, specified the security given. Under the first note, the security was the Debtor's distributive share under the Marshaling and Distributing Plan¹⁴ and the Debtor's rights in all collateral given to the Reconstruction Finance Corporation, subject to the

13. A contractual right of set-off. *Poindexter v. Greenhow*, 114 U.S. 270, 29 Led. 185, commented on in *McGahey v. Virginia*, 135 U.S. 662, 685, 34 Led. 304, 312, col. 2.

14. A "pledge" or a contractual right of set-off?

lien of the latter. The second note was secured by the same collateral and also by \$2,000,000 General and Refunding Bonds pledged by the Debtor, \$2,000,000 General and Refunding Bonds furnished directly by the James Co. and evidences of claims of The Western Pacific Railroad Corporation for advances against the Debtor and certain of its subsidiaries, said claims being furnished by The Western Pacific Railroad Corporation as accommodation collateral.

Both of the Debtor's notes to The Railroad Credit Corporation, in respect of the distributive share of the Debtor under The Marshaling and Distributing Plan, 1931, provided that the Debtor "agrees * * * to pledge¹⁴ and does hereby pledge¹⁴ with the payee the Railroad Company's share in the fund established under the aforesaid plan, as the same may be at any time and from time to time determined * * *. * * * the securities hereby pledged * * * as security for this or any other obligation of the Railroad Company to the payee, shall be applicable in like manner to secure the payment of any and all such obligations. And all such securities in the hands of the payee shall stand as one general continuing collateral security for the whole of said obligations so that the deficiency on any one may be made good by enforcement of the rights and remedies of the payee in respect of the sale of collateral or otherwise as to the rest and the Railroad Company hereby gives to the payee a lien for the amount of all of the liabilities aforesaid upon all other property of the Railroad Company at any time coming into the possession of the payee." The payee is given the right to "itself purchase the whole or any part of the securities". The Railroad Company "further authorizes the payee, at its option, at any time, to appropriate and apply to the

payment of any of the aforesaid liabilities, whether now existing or hereafter contracted, any or all property now or hereafter in the hands of the payee belonging to the Railroad Company, whether the aforesaid liabilities are then due or not due.”¹⁵

The principal amount of the claim of The Railroad Credit Corporation, stated in the table at page 7 above, was the principal amount of these notes reduced by \$150,829.12 of distributions under The Marshaling and Distributing Plan, 1931. In addition, as of November 30, 1939, there was under the Marshaling Plan, an undistributed book balance to the Debtor and to its subsidiaries of \$53,541.39 (I-R 1056, 1057, 1211-1213). Of this amount \$26,091.72 only is involved here.¹⁶

The following appears in the District Court’s “Order Approving Plan of Reorganization of Debtor”:

“The Court finds:

“1. The findings of fact made by the Interstate Commerce Commission in its original report of October 10, 1938, as modified by its supplemental report of June 21, 1939, are supported by the evidence, and as supplemented by the stipulation of the parties filed herein on December 20, 1939, **are adopted as Findings by this Court.**” (34 F. Supp. 493, 505 col. 2; I-R 1601.)

The Commission, in its supplemental report of June 21, 1939—“Report of the Commission on Further Consideration”—found as follows as to the second item of security

15. A contractual right of set-off waiving any claim that it could not operate prior to maturity of the debt. See note 13 above.

16. The balance which accumulated after the effective date of the Reorganization Plan was \$26,091.72. (See p. 30 below.)

of The Railroad Credit Corporation, its second lien on the General and Refunding Bonds pledged with Reconstruction Finance Corporation (item (2) p. 12 above):

“In this connection we also find that such allocation of reorganization securities to the Finance Corporation exhausts the value of the collateral pledged by the Debtor under the notes held by the Finance Corporation, and that the equity of the Credit Corporation in such collateral has no value.” (I-R 316.)

In its order of the same day, the Commission set out the final reorganization plan which was approved by the District Court and the Supreme Court. In that order and plan the following appears:

“The Railroad Credit Corporation’s equity in the collateral securing the claim of the Reconstruction Finance Corporation is found to be without value.” (I-R 392.)

If the Reconstruction Finance Corporation’s claim (principal and interest amounting to \$3,862,869.98, see table p. 7 above) exhausted security consisting of \$10,750,000.00 General and Refunding Bonds of the Debtor and other collateral (as the Commission found), we have a definite **finding** that however much less in value those bonds might be, **they could not be worth more than 359.3367 per 1,000 of principal amount plus interest.** It follows that \$4,000,000.00 principal amount of these same General and Refunding Bonds (including interest) pledged with The Railroad Credit Corporation as collateral (see p. 7 above), while they might have a lower value, **could not have a value of more than \$1,437,346.00.** The claim of The Railroad Credit Corporation, principal and interest, was \$2,590,-

924.11 (see table p. 7 above).¹⁷ It exceeded the value of the security held in the form of **General and Refunding Bonds** by \$1,153,578.00.¹⁷ To that extent Credit Corporation was unsecured unless it had other security. To this we shall return after the issue has been presented. It is enough to notice here that the only other security Credit Corporation had, which could be said to come from, or be property of, the Debtor, was the Debtor's distributive share under the Marshaling Plan, 1931.

If the Debtor's distributive share under the Marshaling and Distributing Plan be considered merely a set-off under a contractual right, then the only effect was to reduce the unsecured portion of the Railroad Credit Corporation's claim. Such treatment, we will show, would have no effect upon the new securities to be distributed to The Railroad Credit Corporation. If, however, this distributive share be considered as pledged to The Railroad Credit Corporation, then the Credit Corporation had a senior and first lien on this distributive share (indeed, no other creditor had any lien on the distributive share) and had a claim which would completely exhaust this security as well as any other security which the Debtor had given (see below p. 35). (The amount of this distributive share in question is only \$26,091.72. See below p. 30.)

The method of distribution of new securities under the Plan of Reorganization

The way in which the Commission determined what new securities should be issued and how they should be

17. We are postponing for the moment consideration of the effect of the contractual set-off provided for. See notes 13 and 15 above. To preserve identity we are still using the figures in the table at p. 7 above.

allotted, is of high importance. It appears in some detail in the reports and orders of the Commission and in the decision of the Supreme Court. The District Court was satisfied to say simply that it was in accord with the conclusions reached by the Commission, and that further discussion would be superfluous. The matter is so far beyond dispute that it can be stated without detailed references to the record.

The prospective income of the Debtor was calculated. It was then determined what calls there would be upon that income and what would be available to support a capital structure. This having been ascertained, the capital structure was then determined. It was found that the securities which properly could be issued (the capital structure determined upon) against the income were not sufficient to do more than satisfy existing liens on the property of the Debtor. **Unsecured claims were expressly found to be valueless** (Commission Report of Oct. 10, 1938, I-R 269; I-R 279; Order of Oct. 10, 1938, I-R 294; Final Plan, Order of June 21, 1939, subd. P-6, I-R 392; 34 F. Supp. 493, 498, 507, I-R 1579, 1605) and, of course, where any creditor had a lien but that lien was insufficient to satisfy its claim, to the extent that the lien was insufficient the claim was valueless **against the Debtor**. Such claims were excluded from consideration. One of the points of the decision of the Supreme Court was that

“we hold that the elimination of the claims of stockholders and creditors which are valueless from participation in the reorganization is in accordance with valid provisions of §77(e).” (318 U.S. 448, 475, 87 L.ed. 892, 933.)

This is the finding and holding which the Supreme Court says the Commission was made “correlative to and as a basis for its allocation of securities” (318 U.S. 448, 462, 87 L.ed. 892, 926).

If unsecured claims were valueless it was because the Debtor’s property was exhausted by liens of secured creditors. The necessary correlative is that the only creditors entitled to participate in distribution of the Debtor’s property, through the issuance of new securities, were the holders of liens on that property; that they so participated by receiving new securities, to the extent of the liens held. The Commission expressed it by saying that the new securities “represent the equitable equivalent of the Debtor’s assets available for the satisfaction of claims” (I-R 316). The Supreme Court said:

“Findings were made as to the property covered by the different mortgages of the debtor and securities allocated on the basis of that finding. * * * The important element is the allocation of the securities so as to preserve to creditors the advantages of their respective priorities.” (318 U.S. at 483, 87 L.ed. at 937.)

The only concern was an equitable distribution of the assets of the Debtor through issuing new securities. The plan was concerned with claims and securities held by the creditors only insofar as they bore on this problem. Since the liens exhausted the Debtor’s property, unsecured claims were out of the picture. The only concern then was with liens held by the creditors insofar as they bore on distribution, and, of course, the only liens of any creditors which had any relevancy on that question were liens on

the Debtor's property to be thus distributed. This the Supreme Court made clear in its discussion under the heading "Accommodation Collateral" (318 U.S. at 503, et seq., 87 L.ed. at 947 et seq.). (And see p. 34 below.)

How the Commission worked out its problem is dealt with in such detail in its reports and orders, and in the opinion of the Supreme Court of the United States, that there is no occasion to repeat it here. It was found that the first mortgage was a prior lien on certain assets, and that the General and Refunding Bonds were a prior lien on other assets. Adjustment was made for this, and a distribution was then made to the first mortgage bondholders and to Reconstruction Finance Corporation, which for reasons not material here, was given preferential treatment and was put upon the same basis as holders of first mortgage bonds. The remaining securities available for distribution were distributed to the only two remaining secured creditors, The Railroad Credit Corporation and the James Co.

In making this distribution the allocation was made to these creditors solely upon the basis of the liens they held in the form of General and Refunding Mortgage Bonds.¹⁸ The total amount of their respective claims was disregarded.¹⁸ The pledge (if it can be called a pledge) of the Debtor's distributive share under the Marshaling and Distributing Plan, 1931, was not considered. No allotment was made in respect of it. Allocation was solely on the basis of General and Refunding Mortgage Bonds held.

18. There is nothing peculiar to §77 proceedings in this method of adjusting rights of creditors of an insolvent. The common-law rule is the same. *First Nat. Bk. of Ottawa v. Kay Bee Co.*, 366 Ill. 202, 7 N.E.2d 860.

There is some difference in allocations between the Commission's first report and its supplemental report. This was because the first report proceeded on the assumption that the General and Refunding Mortgage Bonds were not a first lien on any assets. This was corrected in the supplemental report. But in making a change the Commission adhered to the fundamental principle of distribution of new securities only for General and Refunding Bonds.

In its original report the Commission, after pointing out that the securities distributable to The Railroad Credit Corporation and the James Co. "are inadequate in value to satisfy the aggregate claims of these parties", went on to say that

"it follows that it would be inequitable to distribute such stock in the proportion that each claim bears to the total amount of such stock. **The value of each of the claims is proportionate to the collateral securing it, and we find that the allotment of the stock should be made on the basis of the collateral held rather than on the amount of the claims.**" (I-R 271; see also I-R 269.)

In harmony the Commission's original proposed plan provided:

"The Reconstruction Finance Corporation, Railroad Credit Corporation, and A. C. James Company, holders of the Debtor's notes which are secured by the pledge of the Debtor's General Mortgage Bonds, to receive in exchange therefor and for accrued unpaid interest thereon, 159,462 shares of new no-par-value common stock, **the stock to be distributed among them on the basis hereinbefore described, * * *.**" (I-R 278.)

The conclusion of the Commission in its second report is:

“From the foregoing, it appears that the creditors secured by the general and refunding mortgage bonds should be awarded new income-mortgage bonds in the amount of \$732,010, and new participating preferred stock of a par value of \$1,147,955. Applying to these amounts the proportionate amounts of general and refunding mortgage bonds securing the notes of the Finance Corporation, The Credit Corporation, and the James Company, the Finance Corporation would receive \$414,175 of income-mortgage bonds and \$649,518 of new preferred stock, the Credit Corporation \$154,111 of income-mortgage bonds, and \$241,681 of new preferred stock, and the James Company \$163,724 of income bonds and \$256,756 of new preferred stock for part of their claims. However, this allocation will apply only to the Credit Corporation and the James Company, for as appears herein, we approve the allocation of new securities to the Finance Corporation on a different basis, i.e., on the basis upon which securities are allocated to the holders of existing first-mortgage bonds. * * * The above modifications require further modification of our prior report and order with respect to the allocation of the reorganization securities.” (I-R 315, 316.)

The Commission then states its new allocation:

“Based upon our conclusion as to the relative priority, value, and equity of the various claims and the value of the new securities available in exchange therefor, we find that the new securities should be allotted as follows: (1) First-mortgage bondholders, * * *; (2) Finance Corporation, * * *; (3) Credit Corporation, \$154,111 of income mortgage bonds, \$241,681 of preferred stock, and 35,425 shares of common stock,

(the common stock to be taken at a price of \$62 a share); and (4) James Company, \$163,724 of income mortgage bonds, \$256,756 of preferred stock, and 37,635 shares of common stock (**being the amount of common stock which bears to the amount of common stock allotted to the claim of the Credit Corporation the same proportion that the principal amount of general and refunding bonds of the debtor held by the James Company as collateral for its claim bears to the principal amount of such bonds held by the Credit Corporation for its claim**). We will modify our prior report and order accordingly.” (I-R 317, 318.)

The District Court expressed the result as follows:

“RCC and ACJ are allotted new securities on the following basis: From the new securities, which the Commission finds are properly **issuable in respect of the refunding mortgage bonds** held as collateral for the RFC, RCC and ACJ notes, are deducted that proportion of each class which the principal amount of **refunding mortgage bonds** held by RFC as collateral bears to the total amount of pledged refunding mortgage bonds. The balance of such new securities is then **divided between RCC and ACJ in proportion to the principal amounts of refunding mortgage bonds** held by them, respectively, as collateral.” (34 F. Supp. at 498 4 col., I-R 1579.)

The Supreme Court said that the “allocation was based” not upon the claims but “upon the ‘relative priority value and equity of the various claims.’ ”

Finally, in the opinion of the District Court underlying the order from which this appeal is taken, the District Court had this to say:

“The Railroad Credit Corporation claims that * * * the new securities are based on the amount of general and refunding mortgage bonds held by it as collateral for its claim, and not on the amount of its claim; * * *. * * * In its approval of the plan issued October 10, 1938, (later modified in other respects) the intention of the Interstate Commerce Commission is shown: ‘The value of each of the claims is proportionate to the collateral securing it, and we find that the **allotment of the stock should be made on the basis of the collateral held** rather than on the amount of the claims.’ **There is no doubt that the allotments were made on the basis contended for by The Railroad Credit Corporation.**” (II-R 104, 105.)

Nothing could make this clearer than to compare the allocation to the James Co. (whose claim far exceeded that of the Credit Corporation, but whose holding of General and Refunding Bonds was about the same) with the allocation to the Credit Corporation. (See tables at pp. 7 and 11 above, and see pp. 53 and 54 below.)

From the foregoing it is clear that nowhere was any consideration given to the Debtor’s distributive share under the Marshaling Plan, 1931, as a factor in determining the amount or character of new securities to be allocated to The Railroad Credit Corporation.

IV.

THE TERMS OF THE REORGANIZATION PLAN SUBMITTED FOR CONSTRUCTION AND THE ISSUE PRESENTED.

Terms of the Plan of Reorganization

The foregoing is the setting for Parts P¹⁹ and R of the Plan of Reorganization. It provides:

“P. The existing securities of the debtor shall be treated as follows:

“1. Existing equipment trusts, Baldwin lease, and Pullman contract, aggregating \$2,750,050 shall remain undisturbed and shall be assumed by the reorganized company.

“2. Holders of existing first-mortgage bonds shall receive for each \$1,000, principal amount thereof, together with \$266.66⅔ of the interest accrued and unpaid thereon to January 1, 1939, **approximately**²⁰ \$400 of income-mortgage 4½ percent bonds, series A (being 40 percent of the principal amount of said existing bonds); \$600 of 5-percent preferred stock, series A (being 60 percent of the principal amount of said bonds); and 4.67 shares of common stock (being common stock taken **at the price of \$57 a share**²⁰ for 100 percent of said accrued and unpaid interest).

“3. The Reconstruction Finance Corporation shall receive in respect of the \$10,000,000 of new money provided for in subdivision O (or the surrender of trustees'-certificates at their principal amount and accrued interest, to a like amount) and its existing claim in the principal amount of \$2,963,000, together

19. The quotation in note 6 of the Supreme Court opinion (see this footnote quoted at p. 10 above) is not an exact quotation of subdivision P.

20. The occasion for this emphasis will appear below at p. 50 et seq. Notice that the word “approximately” appearing in the Plan does not appear in the report. See p. 23 above.

with \$899,870 of interest accrued and unpaid thereon to January 1, 1939, **approximately**²⁰ \$10,000,000 of new first-mortgage 4-percent bonds, series A (being 100 percent of said new money), \$1,185,200 of income-mortgage 4½-percent bonds, series A (being 40 percent of the principal of said claim); \$1,777,800 of 5-percent preferred stock, series A (being 60 percent of the principal of said claim); and 15,788 shares of common stock (being common stock taken **at the price of \$57**²⁰ a share for 100 percent of said accrued and unpaid interest).

“4. The Railroad Credit Corporation shall receive in respect of its claim in the principal amount of \$2,455,610,²¹ together with \$146,503 of interest accrued and unpaid thereon to January 1, 1939 (subject to the reduction of **said amounts**²² by the application, prior to the date of issue of the new securities under the plan, of any proceeds from the distributive shares of the company or its subsidiaries under the marshaling and distributing plan, 1931), **approximately**²⁰ \$154,111 of income mortgage 4½-percent bonds, series A; \$241,681 of 5-percent preferred stock, series A; and 35,425 shares of common stock (being common stock taken **at the price**²⁰ of \$62 per share). The Railroad Credit Corporation's equity in the collateral securing the claim of the Reconstruction Finance Corporation is found to be without value.

“5. The A. C. James Company shall receive in respect of its claim in the principal amount of \$4,999,800, together with \$1,249,950 of interest accrued and unpaid thereon to January 1, 1939, \$163,724 of income mortgage 4½-percent bonds, series A; \$256,756 of 5-

21. This figure seems to be a typographical error. Everything else in the record indicates that it should be \$2,445,610.

22. That is, the amounts of the **claim**, not the amount of new securities.

percent preferred stock, series A; and 37,635 shares of common stock (being an amount of common stock which bears to the amount of common stock allotted to the claim of the Railroad Credit Corporation the same proportion that the principal amount of general and refunding mortgage bonds of the Debtor held by the A. C. James Company as collateral for said claim, bears to the principal amount of such bonds held by the Railroad Credit Corporation as collateral for its claim).

“6. The unsecured claims of the Western Pacific Railroad Corporation and the Western Realty Company, and other unsecured claims not entitled to priority over existing mortgages, are found to be without value, and no securities or cash shall be distributed under the plan in respect of these claims.

“7. The capital stock of the Debtor is found to be without equity or value, and the stockholders shall not be entitled to participate in the plan.

“Q. * * *.

“R. The Capital Stock of the Debtor * * * shall be cancelled.

“Existing mortgages on the Debtor’s property shall be released and cancelled, * * *. All collateral pledged by the Debtor as security for notes to the Reconstruction Finance Corporation, The Railroad Credit Corporation, and the A. C. James Company shall be reduced to possession by the respective pledgees thereof, and shall be by them surrendered to the reorganized company and cancelled, **except** that The Railroad Credit Corporation shall **not** release or surrender any right or interest in the distributive shares of the debtor or its subsidiaries under the Marshaling and Distributing Plan, 1931, but any proceeds from such distributive

shares after the effective date of the plan shall become the property of and be retained by the Railroad Credit Corporation, but to the extent to which received **prior to the issue of the new securities** under the plan shall be applied in reduction of the **claim** of The Railroad Credit Corporation in respect of which new securities are to be issued²³ at the rates provided in subdivision P. * * *.” (I-R 390-395.)

The effective date of the plan is fixed as January 1, 1939 (I-R 363).²⁴

Proceedings presenting the issue

On May 9, 1944, after the mandate came down affirming the District Court judgment affirming the plan, the Reorganization Committee provided for in the plan filed in the District Court its petition for an order construing the plan of reorganization (II-R 69-94). Part II (II-R 72-76) presented the issue touching proper treatment of the Debtor's distributive share under the Marshaling and Distributing Plan, 1931. The petition quotes Paragraphs 4 and 5 of subdivision P of the Plan of Reorganization (p. 27 above), part of subdivision R (quoted above at p. 28), the opinion of the District Court dealing with the allotment of securities to The Railroad Credit Corporation and the James Co. (quoted at p. 24 above), and alleges that since January 1, 1939, The Railroad Credit Corporation has received from the distributive share of the Debtor under the Marshaling and Distributing Plan, 1931, \$26,091.72,

23. This shows a curious confusion. The new securities were not issued “in respect of” any claim, but were issued “in respect of” the Refunding Mortgage Bonds. See p. 18 et seq. above.

24. And see the opinion of the Supreme Court, p. 6 above.

and that it may receive more. It is then alleged that while The Railroad Credit Corporation concedes that anything received from the distributive share will reduce the amount of the claim it has also taken the position that this does not reduce the amount of securities issuable to The Railroad Credit Corporation.

Determination below

After a hearing (II-R 109-143) the District Court filed a corrected memorandum opinion (II-R 98-108). It said that "the Interstate Commerce Commission has made no recommendation" and has stated that the matter was to be determined by the Court; that since January 1, 1939, The Railroad Credit Corporation has received under the Marshaling and Distributing Plan \$26,091.72, and that petitioners contend that the amount of securities to be allotted to it should be reduced by the proceeds of this distributive share. It concluded that the construction contended for by the petitioners was proper (II-R 101-106). Counsel were directed to prepare a decree.

A decree was prepared, signed and filed (II-R 143-148). The pertinent provisions are:

"The Court further finds and concludes:

"* * *

"(b) That the provisions of subdivisions P and R of the Plan of Reorganization (quoted in Paragraph 5 of the petition),²⁵ which relate to the application of the proceeds of the distributive shares of the Debtor and its subsidiaries under the Marshaling and Distributing Plan of 1941 [1931], require a reduction in

25. Quoted at p. 27 above.

the number of shares of common stock allocated to The Railroad Credit Corporation under Paragraph 4 of subdivision P by one share for each \$62 of such proceeds received by The Railroad Credit Corporation after December 31, 1938, and prior to the issuance of the new securities under the plan;

“* * *

“NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

“* * *

“(3) That the provisions of subdivisions P and R of the Plan of Reorganization, which relate to the application of the proceeds of the distributive shares of the Debtor and its subsidiaries under the Marshaling and Distributing Plan of 1931, be, and are hereby, construed as requiring a reduction of the number of shares of common stock allocated to the Railroad Credit Corporation under Paragraph 4 of subdivision P of the plan by one share for each \$62 of such proceeds received by The Railroad Credit Corporation after December 31, 1938, and prior to the issuance of the new securities under the plan; * * *.”

These are the provisions appealed from.

V.

SPECIFICATION OF ERRORS

Position of The Railroad Credit Corporation

The Court erred (1) in holding that the receipt by The Railroad Credit Corporation after December 31, 1938, of any distributive share of the Debtor or any of its subsidiaries under the Marshaling and Distributing Plan, 1931,

had any legal effect, so far as the reorganization of the Debtor is concerned, beyond reducing the amount of the **claim** of The Railroad Credit Corporation against the Debtor, and (2) in holding that it required a reduction in the number of shares of common stock allocated to The Railroad Credit Corporation under Paragraph 4 of subdivision P of the Plan of Reorganization. Reference is made to the statement of points on which appellant The Railroad Credit Corporation intends to rely, filed in connection with its present appeal (II-R 166-172).

The corollary is the position of The Railroad Credit Corporation:

The liens on the Debtor's properties exhausted them. By consequence unsecured claims (including claims of any secured creditor over the value of security held) were worthless, as against the Debtor's estate. The amount of claims (without regard to the security behind them) in no sense measured participation in the Debtor's assets, i.e. the new securities to be issued. The new securities were not to be issued against or in respect of the amount of claims. The new securities were to be issued only against, and measured by, First Mortgage and General and Refunding Mortgage liens on the Debtor's property held by the claimants, whatever the amount of the claims and however much or little the claims might exceed the liens securing them. The unsecured claims, and the unsecured portion of claims secured in part, were immaterial. They were not a factor in determining the amount, character or allocation of new securities. Any factor affecting only unsecured claims, or the unsecured portion of claims which

were secured in part, and not affecting the measure of value of claims, or basis of allotment used (i.e., the First Mortgage Bonds and the General and Refunding Mortgage Bonds held), did not and can not now affect the allotment of new securities.

In the case of The Railroad Credit Corporation new securities were allotted only against General and Refunding Mortgage Bonds held, and **not** against or measured by its claim, **or even any other security which may have been given by the Debtor** (whether a distributive share under the Marshaling and Distributing Plan, 1931, or otherwise). Whatever The Railroad Credit Corporation realizes from the distributive share of the Debtor and its subsidiaries under the Marshaling and Distributing Plan, 1931,—however that may affect its **claim**,—can not affect the amount of common stock to be received by The Railroad Credit Corporation because it does not touch or affect the General and Refunding Mortgage Bonds of the Debtor held by the Credit Corporation, the only measure of new securities used, and the only thing against which—“in respect of” which—they are to be issued, i.e., General and Refunding Bonds held. However, the Plan properly recognized that the Debtor’s distributive share under the Marshaling and Distributing Plan, 1931, should reduce the amount of the **claim** of The Railroad Credit Corporation because such reduction might affect rights to accommodation collateral held by The Railroad Credit Corporation.

ARGUMENT

Resumé of The Railroad Credit Corporation's position

The Railroad Credit Corporation's position in the Reorganization proceeding is to be stated without regard for any accommodation collateral it may hold.

The extent to which the Railroad Credit Corporation receives **actual** satisfaction of its claim through application of the assets of the Debtor (either because it is permitted to retain and apply assets which it holds, or because it receives distribution of new securities representing interests in the property of the Debtor) may affect its right to resort to accommodation collateral. But **as between The Credit Corporation and the Debtor**, and in the adjustment of rights in the reorganization proceedings, it is not material that the Credit Corporation holds accommodation collateral. The assets of the Debtor are primarily responsible for its debts, and are first to be applied to those debts without regard to accommodation collateral. The rights **as between the Credit Corporation and the Debtor** were to be adjusted without regard to accommodation collateral; as though the Credit Corporation held no accommodation collateral. This much, at least, was settled by the decision of the Supreme Court (318 U.S. 448, 503, 87 L.ed. 892, 947)²⁶.

26. If additional authorities are necessary, the following will be found fully to support the propositions just stated: *Ivanhoe Bldg. & Loan Ass'n v. Orr*, 295 U.S. 243, 79 L.ed. 1419; *New York Trust Co. v. Palmer*, 101 F.2d 1, 3, col. 2 (C.C.A. 2—applying the rule of the *Ivanhoe Case* under §77); *Matter of Blizard*, 20 F.Supp. 481 (E. Dist., Penn.); *Epstein v. Goldstein*, 118 F.2d 73 (C.C.A. 2); 2 *Remington, Bankruptcy*, 4 ed., §912 et seq.; 1 *Collier, Bankruptcy*, 14 ed., §1.28.

It is the general rule, not peculiar to bankruptcy, that security given by the debtor should be exhausted before accommodation collateral (security given by

Disregarding accommodation collateral, the position of The Railroad Credit Corporation in table form is as follows:

Claim against Debtor, principal and interest		(a)	\$2,590,924.11
(See p. 7 above)			
Value of security by way of General and Refunding Mortgage Bonds as found by ICC, not more than.....	(b)	\$1,437,346.00	
(See p. 17 above)			
Amount of Debtor's distributive share under the Marshaling Plan, 1931	(c)	26,091.72	(d) 1,463,437.72
(See p. 30 above)			
Part of claim unsecured and uncompensated for on any theory.....			(e) \$1,127,486.39

The basis upon which new securities were to be issued under the Plan of Reorganization—the thing “in respect of” which they were to be issued—was only General and Refunding Mortgage Bonds, (b) in the table above. There was no allocation on account of the distributive share under the Marshaling Plan, (c) in the table above.

The meaning of subdivisions P and R of the Plan of Reorganization, in so far as they touch the Debtor's distributive share under the Marshaling Plan, 1931, is to be determined in these circumstances and in the light of settled rules of law.

The meaning and effect of subdivisions P and R if the Debtor's distributive share under the Marshaling Plan, 1931, is considered as an offset.

If the Debtor's distributive share of moneys held by The Railroad Credit Corporation under the Marshaling

a surety) is resorted to. *Pinckney v. Wiley*, 86 F.2d 541 (C.C.A. 5); *Robbins-Sanford Mercantile Co. v. Johnson*, 166 Ark. 330, 266 S.W. 260, 37 A.L.R. 1258 and note at 1262; *Robinson v. Roe*, 233 F. 936, 940 (C.C.A. 2—cert. den. 242 U.S. 630, 61 L.ed. 536); *Bearse v. Lebowich*, 212 Mass. 344, 99 N.E. 175; *Goodwin v. Mass. L. & T. Co.*, 152 Mass. 189, 25 N.E. 100, 104, top col. 1; *Smith v. Savin*, 141 N.Y. 315, 36 N.E. 338, 341, bot. col. 1.

Plan, 1931, in view of the express provisions of that plan, is to be considered as a contractual offset against any amount due from the Debtor to The Railroad Credit Corporation (see notes 13 and 15 above), as we believe it should be considered (Bankruptcy Act §68(a), 11 U.S.C.A. Sec. 108(a) made applicable by §77(1), 11 U.S.C.A. Sec. 205(1)), the effect is to reduce Credit Corporation's gross claim ((a) in the table p. 35 above). Even with this reduction, the claim so far exceeds the value of the security held in the form of General and Refunding Mortgage Bonds, (b) in the table above, **the only thing against which new securities are to be issued under the Plan of Reorganization**, that the amount of the set-off and reduction of claim is immaterial. The amount of the **claim** in excess of the value of security held had no bearing, under the Plan of Reorganization, on the amount of new securities to be issued or the allocation of new securities. It is of no consequence what the amount of the **claim** is so long as its net amount, over and above all set-offs and the value of all security originally held and dealt with in the Plan of Reorganization ((e) in the table above at p. 35), is \$1.00 or more.

The construction and application of subdivisions P and R of the Plan of Reorganization if the Debtor's distributive share under the Marshaling Plan, 1931, be considered as property of the Debtor pledged by the Debtor.

If the Debtor's share under the Marshaling and Distributing Plan is considered as property of the Debtor pledged to The Railroad Credit Corporation, then it was property in the possession of The Railroad Credit Cor-

poration, upon which the Credit Corporation had a first lien as senior creditor (see p. 11 et seq. above). Indeed, no other creditor had any lien on it. The portion of the Credit Corporation's claim against the Debtor, over and above the value of General and Refunding Mortgage Bonds held by the Credit Corporation, i.e. the otherwise unsecured portion of the Credit Corporation's claim, was more than enough to exhaust this additional security. Moreover, this security, on this assumption, was as good as cash—it had a dollar per dollar value. As to the Debtor's distributive share under the Marshaling Plan, 1931, the position of The Railroad Credit Corporation was like, but stronger than, the position of the RFC in *In re Chic. & N.W. Ry. Co.*, 126 F2d 351, 369 (C.C.A. 7—cert. den. 318 U.S. 793, 87 L. ed. 1158, reh. den. 319 U.S. 781, 87 L. ed. 726)²⁷.

As to the Debtor's distributive share under the Marshaling Plan, 1931, the Credit Corporation's claim being the only lien upon it, and being sufficient to fully exhaust it (after giving due consideration to any other security held), the Credit Corporation was in precisely the position of the holders of equipment trust certificates, the Baldwin lease and the Pullman contract (see subd. P-1, p. 26 above. Cf. Q, I-R 393, I-R 122, 126, 127, 145-147, 175, 202, 205, 206, 224-227, 248, 261, 277, 285, 343)²⁸. The opinion of the Supreme Court (318 U.S. at 456, 87 L. ed. at 422, col. 1) says:

27. "The RFC held collateral security which it could convert into cash at any time. No other group of bondholders was secured by marketable collateral security of the approximate value of its debt. If the reorganization plans are to be upset and all bondholders and all groups put back in their old position, the RFC could now realize the full amount of its claim through the sale of its collateral. Likewise, if we assume that the plan be rejected and the proceedings dismissed, its legal right so to do would be clear."

28. These are also dealt with in the Bureau's proposed report I-R 122, 126, 127, 145-147, 175, in the Commission's original report and plan I-R 202, 205, 206, 224-227, 248, 261, 277, 285 and in the final report I-R 343.

“The equipment obligations of \$2,750,050 are secured by rolling stock, acquired free of the liens of mortgages, through direct liens or trust arrangements. No one disputes the sound character of any of these securities. They are given priority over the fixed obligations of the reorganized company.”

The Railroad Credit Corporation was entitled to the same sort of treatment, i.e., treatment which would permit it to fully exhaust this security and to do so upon a dollar for dollar basis. No reason for differentiation or discrimination has been, or can be, suggested.

Where, as appears from the table at p. 35 above, a creditor holds a first and senior lien on property and has a claim which will fully exhaust that property, he is entitled to exercise the full measure of his rights. “The right to retain a lien until the debt secured thereby is paid is a substantive property right which may not be taken from the creditor consistently with the Fifth and Fourteenth Amendments to the Constitution. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 594, 79 L. ed. 1593, 55 S. Ct. 854, 97 A.L.R. 1106.” (*Security-First Nat. Bk. v. Rindge Land & Nav. Co.*, 85 F.2d 557, 561,²⁹ reh. den. 86 F.2d 3 (C.C.A. 9—cert. den. 299 U.S. 613, 81 L. ed. 452, reh. den. 300 U.S. 686, 81 L. ed. 888)³⁰.

29. The court added: “Section 77B, subd. (a), 11 U.S.C.A. §207(a) gives the court equity powers, but it does not purport to alter long established incidents of property by introducing a vague and indefinable ‘equity’ into the proceedings. See *In re Judith Gap Commercial Co.* (C.C.A. 9), 5 F.2d 307, 309.”

30. The *Security-First National Case* is quoted with approval and followed in *Horn v. Ross Island Sand & Gravel Co.*, 88 F.2d 64, 65 (C.C.A. 9) and the court adds: “The Plan of Reorganization is to pay the bondholders only 40 percent. of their obligations, such payment being derived from only a portion of the property upon which the bondholders have a lien and to release other property subject to the lien to the debtor and its general creditors. The Plan cannot stand against the objecting bondholders. That the interest of the appellant bondholder is small as compared with the interest of all the other bond-

The full priority rule of *Northern Pac. Ry. Co. v. Boyd* 228 U.S. 482, 57 L. ed. 931, is incorporated in §77(e) through the phrase "fair and equitable". (*Institutional Investors v. Chic., M., St. P. & P. R. Co.*, 318 U.S. 523, 541, 87 L. ed. 960, 995, col. 1,³¹ decided the same day that *Ecker v. W. P. R. Corp.*, approving the plan of Reorganization here involved, was decided.) "Full compensatory provision must be made for the entire bundle of rights which the creditors surrender." (*Consolidated Rock Products Co. v. Du Bois*, 312 U.S. 510, 528, 85 L.ed. 982, 944.³²)

Senior security holders cannot be deprived of their rights on any basis of equitable adjustment or composition. The Supreme Court said in *Marine Harbor Properties v. Manufacturer's Trust Co.*, 317 U.S. 78, 85, 86, 87 L. ed. 64, 69:

"Admittedly the property is worth less than the amount of the First Mortgage indebtedness. * * * Ap-

holders and stockholders does not alter the fact that the appellant has been deprived of property to which he is justly entitled. This cannot be done."

The *Security-First National Case* is cited with approval in *In re Day & Meyer, Murray & Young, Inc.*, 93 F.2d 657, 658, col. 2 (C.C.A. 2), for the proposition that bondholders cannot be deprived of their lien on the debtor's property. The court disapproved a plan which would permit general creditors or stockholders to share with bondholders by giving common stock to all. "Such a plan does not preserve priorities. See *Northern Pac. Ry. Co. v. Boyd*, 228 U.S. 482, 33 S.Ct. 554, 57 L.ed. 931. The arrears of interest is also secured and entitled to priority over the general creditors and preferred stockholders. In their interest claims, the bondholders should be protected. They are not protected under the plan for they are given only common stock."

31. "If it is established that there is no reasonable probability of such earning power, then the inclusion of the stock would violate the full priority rule of *Northern Pac. Ry. Co. v. Boyd*, 228 U.S. 482, 57 L.ed. 931, 33 S.Ct. 554—a rule of priority incorporated in section 77(e)(1), as in section 77B and Chap. X (*Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106, 84 L.ed. 110, 60 S.Ct. 1, 41 Am. Bankr. Rep. (N.S.) 110, supra; *Marine Harbor Properties v. Mfg'r's Trust Co.*, decided Nov. 9, 1942 [317 U.S. 78, 87 L.ed. 64, 63 S.Ct. 93, 51 Am. Bankr. Rep. (N.S.) 1]) through the phrase 'fair and equitable'."

32. In *Institutional Investors v. Chic., M., St. P. & P. Ry. Co.*, 318 U.S. 523, 556, 87 L.ed. 960, 1102, bot. col. 2, the court said, speaking of the *Du Bois Case*: "We held * * * that in applying the full priority rule of the *Boyd Case* (228 U.S. 482, 57 L.ed. 931, 33 S.Ct. 554) and the *Los Angeles Lumber Products Co. Case* (308 U.S. 106, 84 L.ed. 110, 60 S.Ct. 1, 41 Am. Bankr. Rep. (N.S.) 110) full 'compensatory provision must be made for the entire bundle of rights which the creditors surrendered'."

proval of the petition on the grounds advanced by the District Court could be made only under the composition theory of reorganization which Chap. X, like §77B, rejected in favor of the full priority rule of the *Boyd Case*. See *Case v. Los Angeles Lumber Products Co.*, supra. **That rule protects the rights of senior creditors against dilution either by junior creditors or by equity interests.**'³³

In *Institutional Investors v. Chic., M., St. P. & P. R. Co.*, 318 U.S. 523, 562, 569, 87 L. ed. 960, 1006 col. 1, 1009 col 2 the court said:

“In case of first and second liens on the same property, senior lienors, of course, would be entitled to receive, in case the junior lienors participated in the plan, not only ‘a face amount of inferior securities equal to the face amount of their claim’, but in addition ‘compensation for the senior rights’ which they surrendered. (*Consolidated Rock Products Co. v. Du Bois*, supra, 312 U.S. p. 529, 85 L. ed. 995, 61 S. Ct. 675, 45 Am. Bankr. Rep. (NS) 79) * * * Hence, as we indicated in the *Consolidated Rock Products Co. case*, where junior interests participate in a plan and where the senior creditors are allotted only a face amount of inferior securities equal to the face amount of their claims, they ‘must receive, in addition, compensation for the senior rights which they are to surrender’.
* * * **Unless that principle is respected, there will be serious invasions of the rights of senior claimants to the benefit of junior interests. The property of one group will be subtly appropriated to pay the claims**

33. This language was quoted with approval in *Institutional Investors v. Chic., M., St. P. & P. R. Co.*, 318 U.S. 523, 569, 87 L.ed. 960, 1009, col. 2, and the court added: “That view has not been contested here.”

of another while lip service is rendered the principles of priority.’’³⁴

In addition to the cases just referred to, and the cases cited in those cases, the following may be consulted:

Re 620 Church Street Bldg. Corp., 299 U.S. 24, 81 L. ed. 16;

Security-First Nat. Bk. v. Rindge Land & Nav. Co., p. 38 above;

Horn v. Ross Island Sand & Gravel Co., note 30 above;

In re Day & Meyer, Murray & Young, Inc., note 30 above;

Price v. Spokane Silver & Lead Co., 97 F.2d 237 (C.C.A. 8);

Sophian v. Congress Realty Co., 98 F.2d 499 (C.C.A. 8);

Tellier v. Franks Laundry Co., 101 F.2d 561 (C.C.A. 8);

Metro. Holding Co. v. Weadock, 113 F.2d 207 (C.C.A. 6);

Whitmore Plaza Co. v. Smith, 113 F.2d 210 (C.C.A. 6).

The Credit Corporation had a prior and senior lien on the Debtor's distributive share under the Marshaling and Distributing Plan, 1931. As to this distributive share RCC was the sole secured and senior creditor. No one else had any lien on that distributive share. It was the Credit Corporation's property. Credit Corporation was given nothing

34. In the *Consolidated Rock Products Co. Case* the court said (312 U.S. at 529, 85 L.ed. at 995), speaking of senior creditors: "If they receive less than that full compensatory treatment, some of their property rights will be appropriated for the benefit of stockholders without compensation. That is not permissible. The plan then comes within judicial denunciation because it does not recognize the creditors' 'equitable right to be preferred to stockholders against the full value of all property belonging to the debtor corporation'."

in exchange for it under the Plan of Reorganization. If it is to be applied to reduce securities allocated to Credit Corporation but not issued against it, and issued against something else—is to be applied to reduce the amount of common stock the Credit Corporation is to receive—the **practical effect is to use it to pay other claims.** The practical effect is to violate the rule of *Institutional Investors v. Chicago, M., St. P. & P. R. Co.*, 318 U.S. 523, 570, 87 L. ed. 959, 1010, that the *Bôyd Case* is to be adhered to, and that

“unless that principle is respected, there will be serious invasions of the rights of senior claimants to the benefit of junior interests. The property of one group will be subtly appropriated to pay the claims of another while lip service is rendered the principles of priority.”

With deference, the lower court's construction of subdivisions P and R of the Plan of Reorganization, does violence to the rules just noticed.

The practical effect of the decision is to treat the Debtor's distributive share under the Marshaling Plan, 1931, as though it were only the equivalent of common stock at the arbitrary factor (see p. 52 below) of \$62 per share. On this hypothesis Credit Corporation is directed to surrender common stock at \$62 per share to the amount of the Debtor's distributive share under the Marshaling Plan received and applied by the Credit Corporation during the period December 31, 1938 to date of consummation of the plan (December 29, 1944). **Upon the District Court's hypothesis the result would be the same if Credit Corporation received the common stock originally allotted to it and surrendered to the Debtor the Debtor's distributive share ap-**

plied under the **Marshaling Plan**, during the foregoing period, receiving nothing in return, since the common stock was to be issued only against, and in respect of, **General and Refund Mortgage Bonds held**.

The history of the Plan of Reorganization demonstrates that no such result was intended. To the contrary, while such a treatment of the distributive share had at one time appeared in the Plan of Reorganization, it was deliberately written out.

In the Commission's **original report** of October 10, 1938, the Commission concluded that the Plan should provide that collateral pledged by the Debtor to Reconstruction Finance Corporation, Credit Corporation and James Co. should be surrendered to the Debtor, and continued:

"The Railroad Credit Corporation also should release and surrender to the reorganized company its rights and interest in the debtor's distributive shares under the Marshaling and Distributing Plan, 1931, from and after the effective date of the plan, and any proceeds from such shares applied by the Railroad Credit Corporation to the payment of principal and/or interest of and upon the obligations of the debtor after the effective date of the plan, unless such application shall have been made by the authority of the Court of competent jurisdiction, shall be turned over to the reorganized company." (I-R 280.)

The Commission's **original order and plan** of the same date provided:

"The Railroad Credit Corporation also shall release and surrender [to] the reorganized company all its rights and interest in the debtor's distributive share under the Marshaling and Distributing Plan, 1931, from and after the effective date of the plan, and any

proceeds from such shares applied by The Railroad Credit Corporation to the payment of principal and/or interest of and upon the obligations of the debtor after the effective date of the plan, unless such application shall have been made by authority of the Court of competent jurisdiction, shall be turned over to the reorganized company.” (I-R 297, 298.)

On the promulgation of this report and the order The Credit Corporation filed a petition for modification (I-R 675 et seq.). This petition, making the point that “the right to retain a lien until the debt secured thereby is paid is a substantive property right” protected by the Constitution (*Security-First National Bank v. Rindge etc. Co.*, 85 F.2d 557 [C.C.A. 9])³⁵ objected to this provision (I-R 686 et seq.). In this behalf Credit Corporation pointed out:

“In the absence of a voluntary acquiescence by the RCC, which has not been given, these provisions are completely unwarranted and cannot be supported in Court. The rights of the RCC do not rest upon a Court order and the RCC cannot be required to seek a Court order as a condition precedent to the exercise of its rights.

“It may be noted in this connection that the claim of the RCC, as classified by the Reorganization Court, constitutes an entire class of claims. * * *

“Not only is the RCC entitled as pledgee to receive and apply the distributive shares of the Debtor, under the terms of the Marshaling and Distributing Plan, 1931, to which both the RCC and the Debtor are parties, the RCC has the right and is in duty bound not to pay distributive shares in cash to participating

35. See p. 38 above.

carriers that have borrowed from and are indebted to the RCC, but instead to credit such shares upon such indebtedness.”³⁶

The petition then suggested that there should be inserted a provision, contained in the Commission's order in *Chicago Great Western Railroad Company Reorganization*, F.D. No. 10772, as follows:

“Nothing in the foregoing and other provisions herein with respect to The Railroad Credit Corporation is intended to limit or in any manner affect the right of that corporation to apply, in its discretion, the income on and proceeds of the collateral held by it, to or toward the payment of the principal, or interest, or both, of or upon its **claim** against the Debtor prior to the consummation of the reorganization.”

Very considerable other opposition developed to the Commission's originally proposed Plan of October 10, 1938. As appears from Institutional Bondholders' Committee's petition for modification (I-R 753 et seq.) there was danger that the plan would fail of confirmation by the creditors. To prevent this the Bondholders' Committee endeavored to negotiate with the creditors to bring them to agreement, and, having failed, by its petition for modification submitted a new plan which it felt would be sufficiently satisfactory ultimately to be put into operation. Sensitive to the point made in the Credit Corporation's petition for modification this modified plan contained the following:

36. See p. 13 et seq. above.

“4. RCC will receive in respect of its claim in the principal amount of \$2,445,610, together with \$146,503 of interest accrued and unpaid thereon to January 1, 1939 (subject to the reduction of **said amount**³⁷ by the application, prior to the date of issue of the new securities under the capitalized plan, of any proceeds from the distributive shares of the company or its subsidiaries under the Marshaling and Distributing Plan, 1931): 37,030 shares common stock * * *.”

The Commission, in its supplemental report of June 21, 1939, modified its original report and plan in some respects (not in all). One modification had to do with treatment of the Debtor's distributive share under the Marshaling and Distributing Plan, 1931. The modification goes back to the Credit Corporation's suggestion (p. 45 above) and to the modification in the Bondholders' Committee's plan. In its report the Commission said:

“Under the bondholders' committee's modified plan, existing mortgages on the Debtor's properties would be released and cancelled, * * *. All collateral pledged by others than the Debtor * * * would be surrendered to the pledgors thereof, and **all collateral pledged by the Debtor** as security for such notes would be reduced to possession by the respective pledgees thereof, and would then be by them surrendered to the reorganized company and cancelled, **except** that the Credit Corporation would **not** release or surrender any right or interest in the distributive shares of the Debtor or its subsidiaries under the Marshaling and Distributing Plan, 1931, **but any pro-**

37. Notice the marked change. The distributive share of the Debtor is not to be “released and surrendered” directly or through reduction in the amount of new securities. Only the amount of the **claim** is to be reduced. This is just what The Railroad Credit Corporation suggested should be done as in the *Chicago Great Western* matter. See p. 45 above.

ceeds from such distributive shares after the effective date of the Plan, would become the property of and be retained by the **Credit Corporation**, but to the extent to which received prior to the issue of the new securities under the plan would be applied in reduction of the **claim** of the Credit Corporation.

“Conclusion.—We do not approve that part of the foregoing provisions which states that all collateral pledged by others than the Debtor as security for the Debtor’s notes to the Finance Corporation, Credit Corporation, and James Company would be surrendered to the pledgors thereof. With this provision eliminated we approve the foregoing provisions.” (I-R 344, 345.)

As matter of reasoned choice the Credit Corporation was **not** required to surrender any part of the Debtor’s distributive share. Upon objection such provision had been deliberately removed from the Plan. It is equally clear that none of the new securities were issued against or in relation to this distributive share. The history of the provisions under consideration demonstrates that as a matter of deliberate choice, receipt of anything by the Credit Corporation from the Debtor’s distributive share was to go to reduce the amount of Credit Corporation’s “claim”, and was to do nothing more. **When the Commission used the work “claim” it meant exactly that and no more.** The distributive share occupies no lesser position than that of any other pledged collateral in the possession of a pledgee, the income and proceeds from which are received and applied against principal or interest or both of the claim secured thereby. (See Orders Nos. 100 and 101 of District Court of Connecticut in the reorganization proceedings of the New York, New Haven and Hartford Railroad Company

reported on pages 2689-2697 and 2829 of printed court records of said proceedings. See also printed record pages 3533-3534 of reorganization proceedings of St. L. SW. Ry. Co. where similar ruling was made.)

There is nothing in the language of the Plan of Reorganization which compels disregard of the rule of the *Boyd Case* and the other considerations just noticed. To the contrary, full effect can be given to them, and the full measure of compensation to which the Railroad Credit Corporation is entitled can be afforded to it, if the Plan of Reorganization is taken and applied as it is written and clearly intended.

The construction which the District Court puts on the Plan of Reorganization not only disregards the considerations to which we have called attention, and denies to The Railroad Credit Corporation the "full compensation" for "its entire bundle of rights"—fails to protect its rights against dilution by junior interests and subtly appropriates its property to pay the claims of others—but distorts and really re-writes the Plan of Reorganization.

Subdivision P, paragraph 4 of the Plan of Reorganization provides:

"The Railroad Credit Corporation shall receive in respect of its claim in the principal amount of \$2,455,610 [\$2,445,610]³⁸, together with \$146,503 of interest accrued and unpaid thereon to January 1, 1939 (subject to the reduction of **said amounts** by the application, prior to the date of issue of the new securities under the plan, of any proceeds from the distributive shares of the company or its subsidiaries under the

38. See note 21 above.

Marshaling and Distributing Plan, 1931), * * * and 35,425 shares of common stock (being common stock taken at the price of \$62 per share).”

The court below construes this as though it reads:

“The Railroad Credit Corporation shall receive in respect of its claim * * * (subject to the reduction of the common stock hereinafter referred to at the rate of one share for every \$62 received, prior to the date of issue of the new securities under the plan, of any proceeds from the distributive shares of the company or its subsidiaries under the Marshaling and Distributing Plan, 1931), * * * and 35,425 shares of common stock.”

Subdivision R of the Plan of Reorganization provides:

“All collateral pledged by the Debtor to * * * shall be surrendered by them to the reorganized company and cancelled, except that the Railroad Credit Corporation shall not release or surrender any right or interest in the distributive share of the debtor or its subsidiaries under the Marshaling and Distributing Plan, 1931, but any proceeds from such distributive share, after the effective date of the Plan shall become the property of and be retained by the Railroad Credit Corporation, but to the extent to which received prior to the issue of the new securities under the plan shall be applied in reduction of the claim of the Railroad Credit Corporation in respect of which such new securities are to be issued at the rates provided in subdivision P.”

So far as the quoted provision contains operative language, as distinguished from language of mere description, it provides only for “reduction of the claim”. What follows

merely identifies the claim as the claim “in respect of which new securities are to be issued at the rates provided in subdivision P”. The language is not at the “rate” (singular) provided for issuance of the common stock, but at the “rates”, which obviously refers to the bonds and preferred stock as well. The court construes this provision as though it read:

“ * * * except that the Railroad Credit Corporation shall not release or surrender * * * but any proceeds from such distributive shares * * * shall become the property of and be retained by the Railroad Credit Corporation but to the extent to which received prior to the issue of the new securities under the plan shall be applied in reduction of the common stock to be received by the Railroad Credit Corporation, said reduction to be made at the rate provided in subdivision P, paragraph 4, for said common stock.”

**The reasons suggested by the District Court
do not support its order**

The District Court gave three reasons for its conclusion that the common stock distributable to The Railroad Credit Corporation should be reduced (II-R 105, 106):

1. Unless this construction be given the language of subdivisions P and R, referring to the Debtor's distributive share under the Marshaling and Distributing Plan, 1931, “becomes mere surplusage”.

2. The intention that the amount of common stock distributable shall be reduced is indicated by subdivision R which describes the “claim” which is to be reduced by the distributive share as “the claim of The Railroad Credit Corporation in respect to which new securities are to be issued at the rates provided in subdivision P”.

3. This intention appears from the qualifying word “approximately” which appears before the description of the securities to be received by Railroad Credit Corporation in Paragraph 4 of subdivision P, the Court noticing that this word is not used in Paragraph 5 describing the securities to be issued to the James Company which had no interest in any distributive share.

We take up these reasons in inverse order.

1. With deference, no support can be found in the use of the word “approximately”. Its use was not necessary. While it is used in subdivision P of the plan it was not used in the corresponding portions of the report which underlay and accompanied the Plan (see p. 23 above). In subdivision P “approximately” is not used in Paragraph 5 dealing with the James Company. **But it IS used in Paragraphs 2 and 3 dealing with the first mortgage bondholders and the Reconstruction Finance Corporation.** In those paragraphs it is used in exactly the way in which it is used in Paragraph 4 dealing with The Railroad Credit Corporation. **Neither the first mortgage bondholders nor the Reconstruction Finance Corporation had any interest in any distributive share.** We respectfully call attention to paragraphs 2 and 3 of subdivision P quoted above at p. 26. The reason for use of this cautionary word is patent.³⁹

2. Nor, with deference, can support be drawn from the use of the words “at the rates” used in subdivision R. All that R was doing was **identifying the claim** of The Rail-

39. The obvious reason for use of the word was to allow for minor adjustments, correction of clerical errors, etc. Indeed, need for one such adjustment was found by the Reorganization Committee and adjustment was made on petition (II-R 70-72), opinion (II-R 98-100) and order (II-R 144, 146) in the very proceeding out of which this appeal grows.

road Credit Corporation. It identified it as the claim against which described securities were to be issued. It naturally went back, for its language, to subdivision P where that subject was dealt with. R referred not to the rate for the common stock but “to the rates”. Again, there was no distinction drawn in P between the first mortgage bondholders, Reconstruction Finance Corporation and The Railroad Credit Corporation in form of language (see p. 26 above). Subdivision P, Paragraph 2, deals with the common stock to go to the holders of first mortgage bonds, and the plan adds “(being common stock taken **at the price** of \$57 a share * * *)”. The same form is used as to Reconstruction Finance Corporation in Paragraph 3—it is to get 15,788 shares of common stock “(being common stock taken **at the price** of \$57 a share * * *)”. And this same form is then repeated as to The Railroad Credit Corporation. It is to get 35,425 shares of common stock “(being common stock taken **at the price** of \$62 per share)”.

But there is a more deep-seated difficulty than mere use of language, and comparison of uses. Neither the Commission nor its Plan used \$62 for the common stock as a measure of the sound value of that stock; \$62 was not used as a measure or basis for exchange of that stock where the exchange was to be for cash or for sound security worth its face value.

The Plan of Reorganization states a factor of \$62 per share for the common stock to be received by the Credit Corporation. The District Court, in the order appealed from, adopts this factor and uses it. But this factor of \$62 per share was not a factor logically and rationally arrived

at upon a finding, or even an assumed basis, of real value, made or reached **before** determination of the amount of common stock to be received by the credit Corporation. The amount of common stock to be received by the Credit Corporation was determined in a wholly different way—by determining the amount remaining after satisfying the claims of the first mortgage bondholders and the Reconstruction Finance Corporation, and then dividing this amount between Credit Corporation and James Co. in proportion to the amount of General and Refunding Bonds held by each. The distribution having been determined upon in this way, the factor of \$62 per share was a mere **result** of the distribution, as distinguished from a basis for it—a result of comparison of the number of shares of common stock to the total claim of the Credit Corporation,⁴⁰ after allowance for income-bonds and preferred stock to be issued. This factor was in this sense purely arbitrary. Its statement was only another form of stating the overall priority position of the first mortgage bondholders and the RFC; of stating that they were entitled to priority treatment and, having better security, were entitled to more common stock per dollar of bonds held.

40. It works out within \$29 (less than $\frac{1}{2}$ of one share @ \$62) on the figures used by the Commission in subdivision P 4 of the Plan of Reorganization (I-R 391, quoted at p. 26 above) and used in the opinion of this Court (124 F.2d at 137, col. 2). It misses the figures used in the opinion of the District Court (34 F.Supp. at 497, I-R 1576) and in the opinion of the Supreme Court (318 U.S. at 455, 87 L.ed. at 922; quoted above at p. 7) by \$1,221.89 (19 plus shares @ \$62), increased by \$26,091.72 to a difference of \$27,313.61 (440 plus shares @ \$62) if the Debtor's distributive share under the Marshaling Plan, 1931, is treated as an off-set reducing the Credit Corporation's gross claim.

The ICC and CCA figures for the RCC gross claim are \$2,592,113. The D. C. and Supreme Ct. figures for the RCC gross claim are \$2,590,924.11.

35,425 shares of Common Stock @ \$62 come to \$2,196,350. The new securities to RCC on this basis are:

Bonds	\$ 154,111
Preferred Stock	241,681
Common Stock	2,196,350
	<hr/>
	\$2,592,142

That it in no sense reflected value of the common stock, is demonstrated by the fact that there is assigned to the common stock for purposes of conversion of Income Bonds a factor of \$50 per share (318 U.S. at 461, 87 L.ed. at 925, note 5, quoted at p. 10 above; Plan of Reorganization subdivision J, I-R 374) and for purposes of distribution to holders of first mortgage bonds a factor of \$57 per share (Plan of Reorganization subdivision P 3, I-R 391, quoted at p. 26 above). If the same method of arriving at a factor were used in the case of the James Co. (a creditor to whom distribution was made on exactly the same basis as distribution was made to the Credit Corporation, i.e., on the basis of the proportion of General and Refunding Bonds held) the factor would be \$154 plus.⁴¹

3. Finally, the District Court suggested that unless its construction were adopted, the language of Subdivision P, paragraph 4, referring to reduction of the amount of the claim of The Railroad Credit Corporation would be mere surplusage. With deference, the Court is in error.

There was a real reason why the Plan should expressly provide that receipts by The Railroad Credit Corporation of the Debtor's distributive share under the Marshaling Plan, 1931, should reduce the "claim" of The Railroad Credit Corporation. This would not affect the securities to be issued to The Railroad Credit Corporation, but it might bear materially upon the rights of The Railroad Credit Corporation and The Western Pacific Railroad Corporation in the accommodation collateral held by The Railroad

41. This, as between RCC at 62 and James Co. at 154, would not reflect a priority in class of claim or security, but only a higher proportion of security to debt. It would reflect nothing more for any purpose.

Credit Corporation and supplied by The Western Pacific Railroad Corporation.

This accommodation collateral consisted of three items (see note 9 above). The first was an unsecured claim of The Western Pacific Railroad Corporation against the Debtor for \$5,494,722. It had been assigned to The Railroad Credit Corporation. It was, of course, worthless. But the other two items were not worthless. At least there is no showing that they were worthless and the appeal taken by The Western Pacific Railroad Corporation from another part of the lower court's order of September 14, 1944 is a fair indication that they are not worthless. These two items, as they are shown in the record, and stated in the opinion of the District Court (see note 9 above), are claims of The Western Pacific Railroad Corporation against

Standard Realty and

Development Company \$120,000

Sacramento Northern Railway..... \$856,260 \$976,260

assigned to The Railroad Credit Corporation. There has been some reduction in the indebtedness of Standard Realty and Development Company. But it is apparent that the amount of these claims is reaching toward the limit of the unsecured portion of the claim of The Railroad Credit Corporation (see p. 35 above). At the time the Interstate Commerce Commission promulgated its final report and final Plan of Reorganization on June 21, 1939, it was conceivable that the unsecured portion of the claim of The Railroad Credit Corporation might be reduced to a figure below the then figure of \$976,260 of accommodation

collateral security held by The Railroad Credit Corporation and not then demonstrated to be worthless.

If the unsecured portion of the claim of The Railroad Credit Corporation should be reduced below \$976,260 The Western Pacific Railroad Corporation would be very much interested. Some of the accommodation collateral furnished by it would be in position to be released to it. This is the reason that the Commission's final Plan of Reorganization provided that anything received by The Railroad Credit Corporation from the Debtor's distributive share under the Marshaling Plan, 1931, should be applied to reduce its "claim" against the Debtor. The provision, on the construction we urge, was not mere surplusage.

CONCLUSION

It is respectfully submitted that unless there are compelling reasons to the contrary, to be found in the Plan of Reorganization itself—and there are none—the Plan should be given a construction in harmony with the rule of the *Boyd Case* and the considerations noticed above at pages 35 to 42.

It is respectfully submitted that Finding and Conclusion (b) of the District Court's Order of September 14, 1944 is without support in law or in fact and that paragraph (3) of the same order is erroneous; that these portions of the order should be reversed with directions to strike them from the order, and to enter an order that anything received by The Railroad Credit Corporation on account of the Debtor's distributive shares under the Marshaling and

Distributing Plan, 1931, during the period December 31, 1938 to December 29, 1944, be retained by The Railroad Credit Corporation as its own, that to the extent of such receipts by The Railroad Credit Corporation, prior to the issuance of the new securities, the claim of The Railroad Credit Corporation against the Debtor (principal and interest) be reduced, but that such reduction of the claim of The Railroad Credit Corporation shall not affect the character or number of new securities to be issued to it and it shall receive securities as provided in subdivision P, paragraph 4 of the Plan of Reorganization, without reduction on account of any security held by it over and above General and Refunding Mortgage Bonds.

Dated at San Francisco, April 18, 1945.

ARTHUR B. DUNNE,

*Attorney for Appellant The Railroad
Credit Corporation.*

EDWARD G. BUCKLAND,

WILLIAM J. KANE,
Of Counsel.

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

No. 10962

THE RAILROAD CREDIT CORPORATION, a Corporation,
Appellant,
vs.

FREDERICK H. ECKER, FRANK C. WRIGHT and ROBERT E.
COULSON, the members of the Reorganization Committee of the
Western Pacific Railroad Company, Debtor,
Appellees,
and

THE WESTERN PACIFIC RAILROAD CORPORATION,
a Corporation,
Appellant,
vs.

THE RAILROAD CREDIT CORPORATION, a Corporation,
Appellee.

BRIEF ON BEHALF OF APPELLEES FREDERICK H.
ECKER, FRANK C. WRIGHT, AND ROBERT E. COUL-
SON, THE MEMBERS OF THE REORGANIZATION
COMMITTEE OF THE WESTERN PACIFIC RAILROAD
COMPANY, DEBTOR

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PAUL P. O'BRIEN,
CLERK

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**United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT**

THE RAILROAD CREDIT CORPORATION,
a Corporation,

Appellant,

vs.

FREDERICK H. ECKER, FRANK C.
WRIGHT and ROBERT E. COULSON, the
members of the Reorganization
Committee of the Western Pacific
Railroad Company, Debtor,

Appellees,

and

THE WESTERN PACIFIC RAILROAD COR-
PORATION, a Corporation,

Appellant,

vs.

THE RAILROAD CREDIT CORPORATION,
a Corporation,

Appellee.

No. 10962

**BRIEF ON BEHALF OF APPELLEES FREDERICK H.
ECKER, FRANK C. WRIGHT, AND ROBERT E. COUL-
SON, THE MEMBERS OF THE REORGANIZATION COM-
MITTEE OF THE WESTERN PACIFIC RAILROAD
COMPANY, DEBTOR**

Statement of the Case

On September 14, 1944, the District Court of the United States, Northern District of California, Southern Division, made an order construing the plan of reorganization of The Western Pacific Railroad Company and reconciling inconsistencies therein (TR-10962, p. 143). This appeal by The Railroad Credit Corporation is from paragraph (3) of that order, which provides (TR-10962, p. 147):

“(3) That the provisions of subdivisions P and R
of the plan of reorganization, which relate to the ap-

plication of the proceeds of the distributive shares of the debtor and its subsidiaries under the marshaling and distributing plan of 1931, be and are hereby construed as requiring a reduction in the number of shares of common stock allocated to The Railroad Credit Corporation under paragraph 4 of subdivision P of the plan by one share for each \$62 of such proceeds received by the Railroad Credit Corporation after December 31, 1938, and prior to the issuance of the new securities under the plan;”

During the period stated in paragraph (3) of the District Court’s order, The Railroad Credit Corporation received proceeds of the distributive shares of the debtor and its subsidiary in the aggregate amount of \$27,094* and applied this sum in reduction of interest upon its claim. Accordingly, upon the issuance of the new securities under the plan of reorganization, the number of shares of common stock of the debtor allocated to the Credit Corporation was reduced by 437 shares.

By this appeal The Railroad Credit Corporation seeks a reversal of paragraph (3) of the District Court’s order and the issuance to the Credit Corporation of 437 shares of common stock of the reorganized Western Pacific Railroad Company.

Proceedings Prior to District Court’s Construction Order

The reorganization proceeding of The Western Pacific Railroad Company was before this Court in 1941 in No. 9714. The history of that proceeding is stated briefly in the Transcript of Record in No. 9714, at pages 1019 and following. Reference is made to the following matters which are pertinent upon this appeal.

* At the time of the hearing upon the Reorganization Committee’s petition for construction (June 2, 1944), the aggregate amount received by The Railroad Credit Corporation was \$26,091.72 (TR-10962, p. 129). This total was increased to \$27,094 by a distribution in December, 1944.

On August 2, 1935, The Western Pacific Railroad Company filed its petition for reorganization under Section 77 of the Bankruptcy Act (47 Stat. 147, c. 204, as amended; 11 U. S. C., § 205) in the District Court of the United States for the Northern District of California, Southern Division. A copy of the petition was filed with the Interstate Commerce Commission. On the same date, the Court entered an order approving the petition as properly filed, providing for the operation of the railroad subject to the supervision and control of the Court, and restraining and enjoining all persons and corporations holding collateral theretofore pledged by the debtor as security for its notes and obligations, from selling, converting or otherwise disposing of such collateral or any part thereof until further order of the Court (TR-9714, p. 18, par. 9). This restraining order and injunction has not been modified or revoked (TR-9714, p. 1020, par. 4).

Subsequently claims were duly filed by or on behalf of various bondholders and creditors (including the claim of The Railroad Credit Corporation) and by the sole stockholder of the debtor Company.

A number of plans of reorganization and modified plans were filed with the District Court and the Interstate Commerce Commission in 1936, 1937 and 1938, and, after proceedings and hearings pursuant to Section 77 of the Bankruptcy Act, the Interstate Commerce Commission, on October 10, 1938, issued its Report and Order approving a plan of reorganization formulated by the Commission (TR-9714, pp. 194, 281). Various parties to the proceeding before the Commission filed petitions for rehearing and modification of the Commission's Report and Order and the plan of reorganization approved therein, and, after rehearing, the Commission, on June 21, 1939, issued its Report and Order on further consideration, approving a modified plan of reorganization, modifying the Report of October 10, 1938, and revoking the Order of October 10, 1938 (TR-9714, pp. 300, 362). No further modification of this plan was made

by the Commission, and, on September 28, 1939, the Commission certified this plan to the District Court. Hearings and arguments were had before the District Court in December, 1939, and January, 1940, and, on August 15, 1940, the Court rendered its opinion and entered an order approving in all respects the plan of reorganization certified by the Commission (TR-9714, pp. 1569, 1600).

Upon appeals from the District Court's order of approval, this Court, on November 28, 1941, reversed the order of the District Court which approved the plan (*In re Western Pac. R. Co.*, 124 F. 2d 136). The Supreme Court of the United States granted certiorari to review the order of this Court, and, on March 15, 1943, reversed the order of this Court and affirmed the order of the District Court approving the plan in all respects (*Ecker v. Western Pacific R. Corp.*, 318 U. S. 448, 63 Sup. Ct. 692).

The plan was then submitted by the Commission to the several classes of secured creditors for acceptance or rejection and was accepted by The Railroad Credit Corporation and all other classes.

The appellees, Frederick H. Ecker, Frank C. Wright, and Robert E. Coulson, were designated as members of the Reorganization Committee to carry out the plan of reorganization pursuant to subdivision R of the plan, and were approved by the District Court by its order entered October 11, 1943. As members of the Reorganization Committee, the appellees were charged with the duty of making provision for carrying out the plan of reorganization under the supervision of the District Court (subd. R of the plan, TR-9714, pp. 395-6).

In the performance of their duties as members of the Reorganization Committee, appellees filed with the District Court on May 9, 1944, a petition for an order construing the plan of reorganization in various respects and reconciling inconsistencies therein (TR-10962, p. 69). This petition

brought before the District Court for determination four questions. The first related to the allotment of common stock to first mortgage bondholders under the provisions of the plan, and the fourth related to the construction of certain provisions in the plan for the determination of available net income for each calendar year, matters which are not in issue upon this appeal. The second related to the retention by The Railroad Credit Corporation of proceeds from the distributive shares of the debtor and its subsidiaries under the Marshalling and Distributing Plan of 1931, and the provisions of the plan for a consequent reduction in the Credit Corporation's claim against the debtor Company and in the amount of securities to be issued to the Credit Corporation in the reorganization. The third related to the disposition of the accommodation collateral pledged with The Railroad Credit Corporation by The Western Pacific Railroad Corporation.

On September 14, 1944, the District Court made its order construing the plan of reorganization, and reconciling inconsistencies therein, pursuant to the opinion of the Court dated June 21, 1944 (TR-10962, pp. 98, 143). The Railroad Credit Corporation has appealed from paragraph (3) of the District Court's order (quoted on pages 1 and 2 of this brief) and from the supporting finding and conclusion of the District Court contained in paragraph (b) of the findings and conclusions (TR-10962, p. 149). The Western Pacific Railroad Corporation has appealed as against The Railroad Credit Corporation from paragraph (5) of the District Court's order (TR-10962, p. 150). No appeal has been taken from any other provision of the order.

The Reorganization Committee is interested only in the appeal of The Railroad Credit Corporation from paragraph (3) of the order and the supporting finding thereto. Acting under its duty to carry out the provisions of the plan of reorganization, the Reorganization Committee took the position that the provisions of subdivisions P and R of the plan, relative to the retention by The Railroad Credit Corporation

of the distributive shares of the debtor and its subsidiaries under the Marshalling and Distributing Plan of 1931, required a reduction in the number of shares of common stock to be issued to The Railroad Credit Corporation upon consummation of the reorganization, and the District Court sustained the position taken by the Reorganization Committee.

While the Reorganization Committee in its petition asked the District Court to determine the status of the third party collateral held by The Railroad Credit Corporation, since that collateral consisted of claims against subsidiaries of the debtor Company and might be deemed to affect the consummation of the reorganization and the securities distributable upon such consummation, the Committee did not take any position or make any recommendation to the District Court in respect of the controversy between The Railroad Credit Corporation and The Western Pacific Railroad Corporation. The Committee, therefore, has no interest upon this appeal in sustaining or questioning paragraph (5) of the District Court's order, from which The Western Pacific Railroad Corporation has appealed.

The Issue Before This Court

The Committee takes the position that the appeal of The Railroad Credit Corporation from paragraph (3) of the District Court's order presents one single issue and only one issue—namely, the question of construction of certain provisions of the plan of reorganization. The issues presented by the appeal of The Western Pacific Railroad Corporation from paragraph (5) of the District Court's order are entirely distinct, do not involve the construction of any provisions of the plan and relate to matters which are no concern of the Reorganization Committee. The consolidation of the two appeals before this Court is purely fortuitous. They involve different parties and raise different issues.

The appellees, Frederick H. Ecker, Frank C. Wright, and Robert E. Coulson, as members of the Reorganization

Committee, will deal in this brief only with the question of construction of the provisions of subdivisions P and R of the plan of reorganization presented by the appeal of The Railroad Credit Corporation from paragraph (3) of the District Court's order. The voluminous brief submitted on behalf of The Railroad Credit Corporation, as appellant, states at considerable length the history of the reorganization proceedings and the provisions of the plan of reorganization, and contains an extended argument as to the merits of certain provisions of the plan, the full priority doctrine of *Northern Pacific Ry. Co. v. Boyd*, 228 U. S. 482, 33 Sup. Ct. 554, and other matters of bankruptcy law. The Reorganization Committee believes that these matters discussed in the brief on behalf of the Credit Corporation, and the larger part of the argument therein contained, are entirely beside the point.

Stated briefly and simply, the issue is this: The plan of reorganization of the Railroad Company, as formulated and approved by the Interstate Commerce Commission, was approved in all respects by the District Court, the action of the District Court was affirmed by the Supreme Court of the United States, and, following a favorable vote upon the plan by all classes of secured creditors including the Credit Corporation, the plan was finally confirmed by the District Court on October 11, 1943. Under these circumstances, the fairness of the plan to the Credit Corporation and its conformity to the full priority doctrine of the *Boyd* case are no longer open to question. The District Court was asked by the Reorganization Committee to construe the provisions of the plan relating to the marshalling and distributing payments retained by the Credit Corporation, and the Court made its determination. In consequence, the only question before this Court is whether the determination of the District Court contained in paragraph (3) of its order of September 14, 1944, is supported by the provisions of the plan. There is a further question whether that determination is open to review upon this appeal.

POINT I

The decision of the District Court that the provisions of subdivisions P and R of the Plan of Reorganization, which relate to the application of the proceeds of the distributive shares of the debtor and its subsidiaries under the Marshalling and Distributing Plan of 1931, require a reduction in the securities allocated to The Railroad Credit Corporation under the Plan, is in accordance with and supported by the express provisions of the Plan of Reorganization.

1. The Provisions of the Plan

For the convenience of the Court, we will here set forth the applicable provisions of the plan which were presented to the District Court for construction, together with extracts from the reports of the Commission which shed light upon their meaning.

Paragraph 4 of subdivision P of the plan provides:

“4. The Railroad Credit Corporation shall receive in respect of its claim in the principal amount of \$2,455,610, together with \$146,503 of interest accrued and unpaid thereon to January 1, 1939, subject to the reduction of said amounts by the application, prior to the date of issue of the new securities under the plan, of any proceeds from the distributive shares of the company or its subsidiaries under the marshalling and distributing plan, 1931, approximately \$154,111 of income-mortgage 4½ percent bonds, series A; \$241,681 of 5-percent preferred stock, series A; and 35,425 shares of common stock, being common stock taken at the price of \$62 per share. The Railroad Credit Corporation's equity in the collateral securing the claim of the Reconstruction Finance Corporation is found to be without value.” (TR-10962, p. 72).

Subdivision R of the plan provides, in part:

“* * * All collateral pledged by the debtor as security for notes to the Reconstruction Finance Corporation, the Railroad Credit Corporation, and the A. C. James Company shall be reduced to possession by the respective pledgees thereof, and shall be surrendered by them to the reorganized company and canceled, except that the Railroad Credit Corporation shall not release or surrender any right or interest in the distributive shares of the debtor or its subsidiaries under the marshaling and distributing plan, 1931, but any proceeds from such distributive shares after the effective date of the plan shall become the property of and be retained by the Railroad Credit Corporation, but to the extent to which received prior to the issue of the new securities under the plan shall be applied in reduction of the claim of the Railroad Credit Corporation in respect of which such new securities are to be issued at the rates provided in subdivision P. * * *” (TR-10962, pp. 73-74).

The Commission's original Report of October 10, 1938, provided that all collateral pledged by the debtor to Reconstruction Finance Corporation, The Railroad Credit Corporation and A. C. James Company should be surrendered to the debtor and:

“* * * The Railroad Credit Corporation also should release and surrender to the reorganized company its rights and interests in the debtor's distributive shares under the marshaling and distributing plan, 1931, from and after the effective date of the plan, and any proceeds from such shares applied by the Railroad Credit Corporation to the payment of principal and/or interest of and upon the obligations of the debtor after the effective date of the plan, unless such application shall have been made by authority of the court of competent jurisdiction, shall be turned over to the reorganized company.” (TR-9714, p. 280).

The Commission's original Order dated October 10, 1938, contained a corresponding provision, requiring The Railroad Credit Corporation to surrender to the reorganized company all its right and interest in the debtor's distributive shares under the Marshalling and Distributing Plan of 1931 (TR-9714, pp. 297-8).

Upon petitions for modification of the Commission's original Report and Order, the Credit Corporation objected to the provision requiring it to release and surrender the distributive shares of the debtor and its subsidiaries under the Marshalling and Distributing Plan, and, for reasons which are not at all clear, the Commission, in its Report of June 21, 1939, modified this provision and stated:

“Under the bondholders' committee's modified plan, existing mortgages on the debtor's properties would be released and canceled * * *. All collateral pledged by others than the debtor * * * would be surrendered to the pledgors thereof, and all collateral pledged by the debtor as security for such notes would be reduced to possession by the respective pledgees thereof, and would then be by them surrendered to the reorganized company and canceled, except that the Credit Corporation would not release or surrender any right or interest in the distributive shares of the debtor or its subsidiaries under the marshaling and distributing plan, 1931, but any proceeds from such distributive shares after the effective date of the plan, would become the property of and be retained by the Credit Corporation, but to the extent to which received prior to the issue of the new securities under the plan would be applied in reduction of the claim of the Credit Corporation.” (TR-9714, p. 344).

The Commission then approved these proposals (except that which provided for surrender of collateral pledged by others than the debtor) and adopted the provisions of paragraph 4 of subdivision P of the plan, quoted above, and the provisions of subdivision R which are quoted above.

No question was raised by The Railroad Credit Corporation or any other party before the District Court as to the provisions of the plan of reorganization which relate to the retention by The Railroad Credit Corporation of the distributive shares of the debtor and its subsidiaries under the Marshalling and Distributing Plan of 1931. Nor, indeed, was it to be expected that any such question would be raised by the Credit Corporation since it had been accorded by the Commission a privilege not extended to any other secured creditor of the debtor and was permitted to retain collateral pledged by the debtor (cash or its equivalent), notwithstanding the order of the District Court dated August 2, 1935, enjoining the sale, disposition, or conversion of such collateral. No other secured creditor was permitted, under the terms of the plan, to retain any collateral pledged by the debtor.

No question having been raised in the District Court as to the retention by the Credit Corporation of the marshalling and distributing payments, no question was presented to the Supreme Court and no issue was made of this matter before that Court.

Only when the time approached for the consummation of the plan, and after the plan had been accepted by The Railroad Credit Corporation and all other classes, did the Credit Corporation raise any question as to the meaning of the provisions of the plan relative to the retention by the Credit Corporation of the distributive shares of the debtor and its subsidiaries under the Marshalling and Distributing Plan of 1931. Upon the petition of the Reorganization Committee, as stated above, the District Court proceeded to construe these provisions of the plan.

The Court was authorized to make a “*final and conclusive*” construction of any provision of the plan of reorganization by subdivision V, which provides:

“V. The construction of the plan by the court shall be final and conclusive. The court may cure any defect, supply any omission, or reconcile any inconsistency in such manner or to such extent as may be necessary or expedient in order to carry out the plan effectively.” (TR-10962, p. 69).

The provisions of paragraph 4 of subdivision P of the plan, quoted above, which relate to the application of the proceeds of the distributive shares of the debtor and its subsidiaries under the Marshalling and Distributing Plan of 1931, require a reduction in the claim of The Railroad Credit Corporation by the amount of proceeds of such distributive shares applied by the Credit Corporation after December 31, 1938, and prior to the issue of the new securities under the plan. The provisions of subdivision R, quoted above, expressly require a reduction in the “claim of The Railroad Credit Corporation in respect of which such new securities are to be issued at the rates provided in subdivision P.” The extracts from the Commission’s reports clearly provide for a reduction in the Credit Corporation’s claim by the amount of such proceeds.

The Commission dealt with the claim of The Railroad Credit Corporation as a unit. The reports contain no reference to any unsecured claim of the Credit Corporation and no finding that the Credit Corporation’s claim was not fully secured by the debtor’s collateral held by it. In its original report, the Commission declared that the common stock available for distribution to Reconstruction Finance Corporation, The Railroad Credit Corporation, and A. C. James Company was inadequate in value to satisfy in full the aggregate of their secured claims (TR-9714, p. 271), but made no determination as to the amount of such inadequacy. However, the allocation of common stock to The Railroad Credit Corporation at \$62 a share makes it clear that for the purposes of the plan the common stock allocated to the Credit Corporation had this valuation, so that the

Credit Corporation's claim was fully secured and fully paid. It was the claim of A. C. James Company which was not fully secured and not fully paid. The District Court so held (TR-10962, pp. 105, 107); and the Supreme Court referred to this fact (318 U. S. at 488).

2. Appellant's Contentions

Counsel for The Railroad Credit Corporation claim that the Interstate Commerce Commission determined the value of the debtor's general and refunding bonds held in pledge by the Credit Corporation at \$1,437,346 and allocated to the Credit Corporation new securities only in respect of that part of its claim which was secured by such bonds, and that the distributive shares of the debtor and its subsidiaries under the Marshalling and Distributing Plan in the amount of \$26,091.72 should be considered as applied in reduction of the balance of the Credit Corporation's claim, leaving \$1,463,437 of the claim unsecured except by the third party collateral held by the Credit Corporation (Brief, pp. 17, 35).

It is even asserted (Brief, pp. 36 ff.) that the Credit Corporation was entitled to be treated as a senior creditor with full priority rights (though subdivision P of the plan of reorganization finally approved by the Supreme Court and accepted by the Credit Corporation itself treats the Credit Corporation as a junior creditor), and the special privilege of realizing on debtor's collateral in defiance of the District Court's restraining order of August 2, 1935 (TR-9714, pp. 10-20, par. 4). From this line of reasoning counsel would draw the conclusion that the Credit Corporation is entitled to retain the distributive shares of the debtor and its subsidiaries under the Marshalling and Distributing Plan of 1931, without a corresponding reduction in the securities allocated to it under the plan of reorganization.

This argument is not supported by the plan itself or by findings of the Commission and is wholly unsound.

3. Findings and Capitalization Approved by the Commission

The Commission made no finding either as to the value of the general and refunding bonds or as to the amount by which the aggregate claims of the secured creditors were not fully secured, and it is impossible to spell out from the Commission's reports any finding or suggestion that the Credit Corporation's claim was not refunded in full by the securities allocated to it. The Commission did find the value of certain assets pledged under the general and refunding mortgage upon which that mortgage admittedly constituted a first lien at approximately \$1,850,000; and on this basis approved an increase of \$732,010 principal amount of income mortgage bonds and \$1,147,955 par value of preferred stock to be issued in the reorganization (TR-9714, pp. 314-316). These additional securities were to be issued to the junior creditors, Reconstruction Finance Corporation, The Railroad Credit Corporation, and A. C. James Company. The major part of them were in fact allocated to Reconstruction Finance Corporation (subdivision P of the plan, TR-9714, p. 391). But the Commission neither discussed nor made any finding as to the value of the general and refunding mortgage's second lien on assets which were subject to the prior lien of the first mortgage, nor as to assets of the debtor not subject to either mortgage.

The capitalization of the reorganized Company approved and authorized by the Commission was in fact based on the Commission's estimate of probable earnings and not on property values (TR-9714, pp. 309-10). The Supreme Court, however, spelled out a determination of the value of the debtor's entire system from the "total face and assumed value of the securities authorized by the plan" (318 U. S. at 456, 487). The value so determined was \$84,000,000 plus. If we deduct from this total value the aggregate of the outstanding trustees' certificates, equipment obligations, and first mortgage bonds, principal and interest (\$75,000,000 plus), the remainder of \$9,000,000 should ap-

proximate the value of the assets subject to the lien of the general and refunding bonds and such assets as were not subject to any lien. This figure does not support the Credit Corporation's contention as to the value of the general and refunding bonds or as to the value of the security underlying the Credit Corporation's claim.

True, the Commission did find that the Credit Corporation's equity in the collateral securing the claim of Reconstruction Finance Corporation was without value (TR-9714, pp. 316, 392), a finding which may have been factually erroneous. This finding was an issue in the reorganization proceeding and was in fact attacked by the Credit Corporation before the Commission (TR-9714, p. 675), before the District Court (TR-955), and before this Court in No. 9714 (TR-1644-8).

Whether or not factually erroneous, the conclusion of the Commission that the Credit Corporation's equity in the collateral securing the claim of Reconstruction Finance Corporation was without value is now *res adjudicata* and not open to question upon this appeal.

Lacking a definite finding as to the dollar value of the general and refunding bonds and as to the amount by which the aggregate claims of the three secured creditors were not to be satisfied in full, the Commission could not have allocated definite amounts of new securities in payment of part only of the Credit Corporation's claim, but the Commission did not leave this conclusion to inference. The contention that new securities were allocated to the Credit Corporation in payment of only \$1,437,346 of its claim is disproved by the express language of the plan. Paragraph 4 of subdivision P of the plan, quoted above, allocates new securities to the Credit Corporation "in respect of its claim in the principal amount of \$2,455,610, together with \$146,503 of interest accrued and unpaid thereon to January 1, 1939" (subject to reduction by the application of marshaling and distributing payments).

The allocation of securities to Reconstruction Finance Corporation in full payment of its claim was made in identical terms (TR-9714, pp. 391, 392).

The formula by which counsel for the Credit Corporation determines the extent by which the Credit Corporation's claim was secured by general and refunding bonds held in pledge by it ignores completely the fact that the principal claim of Reconstruction Finance Corporation was in fact paid through the issue of new income mortgage bonds and preferred stock in the same proportions in which first mortgage bonds were refunded; and the accrued unpaid interest on the Finance Corporation's claim was paid in common stock at \$57 a share, the same rate at which the common stock was issued to first mortgage bondholders.

4. The Claims of Senior Creditors Were Refunded in Full

The fallacious character of the argument on behalf of the Credit Corporation is conclusively demonstrated by reference to the amounts and values of the securities allocated to the first mortgage bondholders and to Reconstruction Finance Corporation under the plan. Paragraph 2 of subdivision P provides:

"2. Holders of existing first-mortgage bonds shall receive for each \$1,000, principal amount thereof, together with \$266.66 $\frac{2}{3}$ of interest accrued and unpaid thereon to January 1, 1939, approximately \$400 of income-mortgage 4 $\frac{1}{2}$ -percent bonds, series A (being 40 percent of the principal amount of said existing bonds); \$600 of 5-percent preferred stock, series A (being 60 percent of the principal amount of said bonds); and 4.67 shares of common stock (being common stock taken at the price of \$57 a share for 100 percent of said accrued and unpaid interest)." (TR-9714, pp. 390, 391, par. 2)

Under the absolute priority doctrine of the *Boyd* case (R. C. C. Brief, p. 39; *Ecker v. Western Pacific R. Corp.*, 318 U. S. 483-8, 63 Sup. Ct. 692) the securities allocated to

first mortgage bondholders necessarily provided payment in full for the principal and interest of such bonds plus sufficient additional value to provide for compensation for their lost priority and for reduced interest and postponed maturity date on the new bonds. Upon no other basis could the Supreme Court have approved the plan. Likewise the securities allocated to Reconstruction Finance Corporation must necessarily have paid its claim in full.

The junior creditors, A. C. James Company and The Railroad Credit Corporation, were not entitled to receive one dollar of new securities (other than their proportionate share of the new income mortgage bonds and preferred stock issued in respect of the assets on which the general and refunding mortgage constituted a prior lien) until the first mortgage bonds were paid in full with additional compensation for loss of priority rights. Nor could new securities be allocated to A. C. James Company and The Railroad Credit Corporation at lower values or in amounts which were proportionately greater.

5. The Claim of The Railroad Credit Corporation Was Refunded in Full under the Plan

The Credit Corporation received in respect of its claim with interest (total \$2,590,924) the following:

Income Mortgage Bonds	\$ 154,111	\
Preferred Stock	241,681	
Common Stock at a Value of \$62 a		
Share	2,196,350	
<hr/>		
Total	\$2,592,142	

As a result of the necessity of compensating first mortgage bondholders for loss of their priority rights (*Ecker v. Western Pacific R. Corp.*, 318 U. S. at 484, 488, 63 Sup. Ct. 692; *Group of Investors v. Milwaukee R. Co.*, 318 U. S. 523 at 563, 569-70, 63 Sup. Ct. 727), the rule of absolute priority

required the issuance of common stock to them at a somewhat lower price than it was issued to the Credit Corporation (that is, at \$57 a share, as was expressly provided in paragraph 2 of subdivision P of the plan). Hence the plan provided for refunding in full the claim of the Credit Corporation by the issue to it of the securities listed above.

Thus it was, of course, not possible under the plan and the doctrine of absolute priority as announced and reaffirmed by the Supreme Court, to allocate to the Credit Corporation \$154,111 of income bonds, \$241,681 of preferred stock, and 35,425 shares of common stock in payment of only \$1,437,346 of its claim. To do so would result in the issue of common stock to the Credit Corporation at a value of \$29.40 per share after issuing to it the income mortgage bonds and preferred stock. The Commission could provide for the issue of common stock to the Credit Corporation at a higher rate than it was issued to first mortgage bondholders (at \$62 a share as was done) but not at the rate of \$29 a share as contended by counsel for the Credit Corporation.

The argument as to the value of general mortgage bonds securing the Credit Corporation's claim and all conclusions drawn therefrom fail completely, *first*, because they are inconsistent with the findings and capitalization approved by the Commission and with the provisions of the plan as a whole, and *secondly*, because they would necessarily indicate a violation of the absolute priority doctrine upon which the Supreme Court has placed so much emphasis.

POINT II

The Credit Corporation's rights in debtor's collateral, under its contract of pledge, were subject to modification in the reorganization proceeding.

The brief on behalf of the Credit Corporation, appellant, pages 36-45, discusses at some length the contractual rights of the Credit Corporation under the Marshalling and Dis-

tributing Plan of 1931, and under the pledge agreement between it and the Railroad Company given in connection with the collateral notes of the Railroad Company upon which the claim of the Credit Corporation is based. Whatever rights the Credit Corporation may have had prior to the commencement of the reorganization proceedings in August, 1935, it is obvious that its contractual rights were curtailed by the reorganization proceedings and by the Court's order enjoining the sale or other disposition of collateral held by the Credit Corporation. Thereafter the Credit Corporation was entitled to receive only such new securities as should be allocated to it by the plan of reorganization as finally confirmed, and, upon the consummation of the plan, would be required to surrender the collateral pledged by the debtor.

The first mortgage bondholders, Reconstruction Finance Corporation and A. C. James Co. were required upon consummation of the plan to surrender all debtor collateral held by them as security.

The power of the Commission and the District Court to deal in this manner with debtor collateral held by secured creditors was sustained by the decisions of the Supreme Court in the *Western Pacific* case and the *Milwaukee* case. It was established prior to these decisions in *Continental Illinois National Bank v. Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648, 55 Sup. Ct. 595.

A creditor in a reorganization proceeding holding collateral pledged by the debtor may be enjoined from disposing of such collateral and required to surrender it upon consummation of the reorganization. If he is permitted to retain and apply such collateral, his claim and the securities allocated to it must be reduced pro rata.

POINT III

The construction by the District Court of the provisions of the Plan relating to the Marshalling and Distributing payments is final and conclusive.

Subdivision V of the plan provides:

“V. The construction of the plan by the court shall be final and conclusive. The court may cure any defect, supply any omission, or reconcile any inconsistency in such manner or to such extent as may be necessary or expedient in order to carry out the plan effectively.” (TR-10962, p. 69).

If there is any doubt as to the meaning of paragraph 4 of subdivision P and subdivision R of the plan, in so far as they deal with the distributive shares of the debtor and its subsidiaries under the Marshalling and Distributing Plan of 1931, it is beyond question that the Commission might have spelled out that meaning in express words or might have indicated its construction of the language used by it in the plan, and the meaning and construction adopted by the Commission would have been binding on The Railroad Credit Corporation and all parties after final confirmation of the plan. The Commission anticipated that controversies might arise as to the proper construction of the plan and its provisions. In consequence, subdivision V was inserted in the plan by the Commission for the express purpose of authorizing the District Court to make a final and conclusive construction of any questioned provision of the plan, to the extent that the Commission itself might have made a final and conclusive determination as to the proper construction. It should be noted that the construction of the plan by the Court is to be “*final and conclusive.*” By accepting the plan the Credit Corporation in effect stipulated that no appeal would be taken from the District Court’s construction order (*United States Consol. Seeded*

Raisin Co. v. Chadock & Co., 173 Fed. 577, 9th Circ.; *In re Patterson-MacDonald Shipbuilding Co.*, 292 Fed. 700, 9th Circ., cert. denied 266 U. S. 638; *Hoste v. Dalton*, 137 Mich. 522, 100 N. W. 750).

It follows that by the provisions of the plan itself, as finally approved by the District Court and the Supreme Court of the United States and confirmed by the District Court after a favorable vote of acceptance by all classes of secured creditors, including the Credit Corporation, the construction of the plan by the Court is to be final and conclusive. In view of these considerations, this Court should not overturn the determination of the District Court as to the proper construction of the provisions of paragraph 4 of subdivision P and subdivision R, relative to the effect of the retention by the Credit Corporation of the distributive shares of the debtor and its subsidiaries under the Marshalling and Distributing Plan of 1931, particularly where the construction adopted by the District Court is supported by the express language of the plan itself.

Conclusion

Paragraph (3) of the District Court's construction order of September 14, 1944 and the findings in support thereof should be affirmed or, in the alternative, the appeal should be dismissed.

Respectfully submitted,

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United States
Circuit Court of Appeals
For the Ninth Circuit

THE WESTERN PACIFIC RAILROAD CORPORATION, a corporation,

Appellant,

vs.

No. 10,962

THE RAILROAD CREDIT CORPORATION,
a corporation,

Appellee.

(Consolidated Cases)

THE WESTERN PACIFIC RAILROAD CORPORATION,

Appellant,

vs.

No. 10,966

THE RAILROAD CREDIT CORPORATION,

Appellee.

**Reply Brief of The Railroad Credit Corporation As
Appellee on the Appeals of The Western Pacific
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United States Circuit Court of Appeals

For the Ninth Circuit

THE WESTERN PACIFIC RAILROAD CORPO-
RATION, a corporation,

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No. 10,966

Reply Brief of The Railroad Credit Corporation As Appellee on the Appeals of The Western Pacific Railroad Corporation

I.

SUMMARY STATEMENT OF PROCEEDINGS, APPEALS, AND MANNER OF PREPARING RECORD

There Are Three Appeals.

In the Matter of The Western Pacific Railroad Com-
pany, Debtor, United States District Court, Northern

District of California, Southern Division, No. 26,591-S, a railroad reorganization proceeding under §77 of the Bankruptcy Act, the District Court on September 14, 1944, made its order construing a plan of reorganization which theretofore had been approved. (II-R 143; Opening Brief of The Railroad Credit Corporation on its Appeal in No. 10,962.) The Railroad Credit Corporation appealed from portions of that order. The Western Pacific Railroad Corporation appealed from other portions of the same order. These two appeals were taken on a single record, No. 10,962 in this Court.¹

The proceedings leading to the order appealed from in No. 10,962 were initiated by a petition filed in the reorganization proceedings on May 9, 1944, by the Reorganization Committee designated in the Plan of Reorganization to carry out the plan, and asking for a construction of parts of the Plan. One of the issues presented was the effect of the Plan on accommodation collateral pledged with The Railroad Credit Corporation by The Western Pacific Railroad Corporation. (II-R 69-94) On May 22, 1944, 13 days after the filing of that petition, The Western Pacific Railroad Corporation, as plaintiff, commenced a plenary action in the same court against The Railroad Credit Corporation, as defendant (Civil Action No. 23,307-S). The complaint attempted to tender the same issue tendered by the Reorganization Committee's petition (III-R 2-10). In both proceedings the District Court ruled

1. The Western Pacific Railroad Corporation is not concerned with or affected by the matters raised on the appeal of The Railroad Credit Corporation. But considerations involved on the appeal of The Railroad Credit Corporation touch matters raised on the appeals of The Western Pacific Railroad Corporation. For that reason the Opening Brief of The Railroad Credit Corporation was served upon The Western Pacific Railroad Corporation, and we shall take the liberty of referring to some of the matters it sets out at length.

against The Western Pacific Railroad Corporation. In the Reorganization proceeding the Court did this by its order of September 14, 1944. The Western Pacific Railroad Corporation appealed in No. 10,962. In the plenary action the court's ruling was carried into a judgment (III-R 16). The Western Pacific Railroad Corporation appealed from this judgment in No. 10,966 in this Court.

The Records on Appeal.

At an earlier stage in the reorganization proceedings there were appeals to this Court from the order of the District Court approving the Plan of Reorganization. That was No. 9714 in this Court. Some of the matter contained in the record in No. 9714 is pertinent on these appeals. It was incorporated by reference in the printed record in No. 10,962. This is explained in the Opening Brief of The Railroad Credit Corporation on its appeal in No. 10,962, pp. 1-3. As in that Brief we shall refer to matter physically contained in the printed record in No. 9714 as "I-R", and to matter physically contained in the printed record in No. 10,962 as "II-R". The Western Pacific Railroad Corporation, on its appeal from the judgment in the independent plenary action, prepared a separate record. This is the printed record in No. 10,966. We shall refer to this as "III-R". III-R incorporates by reference the record in No. 10,962, and by consequence the record in 9714. It is important to make this clear because of some statements in The Western Pacific Railroad Corporation's brief.

Where it is necessary to differentiate the proceedings in the District Court we shall do so by number, using the

numbers assigned to the records in *this* Court, designating the reorganization matter as No. 10,962, and The Western Pacific Railroad Corporation's independent plenary action as No. 10,966.

All emphasis by use of bold-face type is ours.

Summary Statement of the Proceedings in the District Court.

To avoid confusion of The Western Pacific Railroad *Company*, the railroad corporation in reorganization as a debtor under Bankruptcy Act §77, with The Western Pacific Railroad *Corporation* we shall hereafter refer to The Western Pacific Railroad *Company* as the Debtor.

The Debtor had borrowed \$2,596,439.00² from The Railroad Credit Corporation, for which it gave partial security and for which others gave additional security. Part of the security given by others was the assignment to The Railroad Credit Corporation by The Western Pacific Railroad Corporation of two claims for money advanced by the latter to subsidiaries of the Debtor—Standard Realty & Development Company³ and Sacramento Northern Rail-

2. The Railroad Credit Corporation's claim was this amount reduced by \$150,829.12 received under the Marshaling and Distributing Plan, 1931, so that the principal of the claim in the reorganization proceeding was \$2,445,609.88. See Opening Brief of The Railroad Credit Corporation on its appeal, pp. 7, 14, 16. In Paragraph 4 of subdivision P of the Plan of Reorganization the principal amount of this claim is stated as \$2,455,610.00. This is an error, \$10,000.00 too much. At every other place in the record the correct amount is given. The correct amount can be determined by taking the principal of the Debtor's notes to The Railroad Credit Corporation and deducting the credit of \$150,892.12 (Opening Brief of The Railroad Credit Corporation on its appeal, pp. 14, 16). The figure used in the opinion of the Supreme Court is the correct figure.

3. The amount originally due from Standard Realty & Development Company to The Western Pacific Railroad Corporation and assigned to The Railroad Credit Corporation as accommodation security for the Debtor's notes was \$120,000.00. (See Opening Brief of The Railroad Credit Corporation on its appeal, p. 7, note 9; Stipulation of Facts Not in Dispute, I-R 1025; Debtor's Note of March 25, 1933, II-R 53.) This amount was reduced by a payment of \$10,000.00. (See evidence on the hearing of June 2, 1944, II-R 115-120, 122 et seq.)

way⁴ (Opening Brief of The Railroad Credit Corporation on its appeal in No. 10,962, pp. 11-16, 54, 55). This is the accommodation collateral referred to on these appeals.

In the Debtor's reorganization proceeding The Railroad Credit Corporation appeared as a secured debtor and The Western Pacific Railroad Corporation appeared as an unsecured creditor.⁵ Under the Debtor's Plan of Reorganization certain of its properties, upon which The Railroad Credit Corporation's security in the form of the Debtor's General and Refunding Mortgage Bonds was a lien, were allotted to The Railroad Credit Corporation by allocating new securities of the reorganized company (Opening Brief of The Railroad Credit Corporation in No. 10,962, pp. 9-11, 18-29). The Western Pacific Railroad Corporation now claims that by this allocation the accommodation collateral it provided was exonerated.

After the Debtor's Plan of Reorganization was approved, and the approval had become final, questions of the meaning and effect of the Plan arose. To resolve these the Reorganization Committee provided for in the Plan filed a petition in the District Court in the reorganization proceeding, submitting these questions to the Court (II-R 69-94). One matter so submitted was The Western Pacific Railroad Corporation's claim of exoneration of the ac-

4. The amount of this advance to Sacramento Northern Railway and assigned to The Railroad Credit Corporation as accommodation collateral for the Debtor's note was \$856,260.00 (Stipulation of Facts Not in Dispute, II-R 1025; Debtor's Note of March 25, 1933, II-R 53; Testimony of DeGrath, II-R 120).

5. Bankruptcy Act, §77(f), provides: "Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders * * * and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it."

commodation collateral held by The Railroad Credit Corporation (Petition, Part III, Paragraphs 9-17; II-R 76-84). On May 9, 1944, the day the petition was filed, the District Court set the petition for hearing on June 2, 1944, and directed that notice be given accordingly (II-R 95-97).

On May 22, 1944, The Western Pacific Railroad Corporation began its independent plenary action (No. 10,966), attempting to raise the same question (III-R 2-10; see p. 2 above). On the next day the parties to that action stipulated that the matter be heard at the time and place fixed for hearing the Reorganization Committee's petition (III-R 11). On May 31, 1944, The Railroad Credit Corporation, defendant in the independent plenary action, filed its motion for dismissal because "the complaint fails to state a justiciable claim against defendant upon which relief can be granted, or in the alternative to grant summary judgment for defendant" (III-R 10-11).

Both matters⁶ came on for hearing at the time noticed and agreed, and were heard together. Testimony was taken (II-R 109-143). Without objection the Court took judicial notice of its own records (II-R 141). If there were any possible question of the right of the Court to consider the record in No. 9714 (I-R)—there is no room for doubt—the doubt was removed. It was further agreed that **all matters before the Court might be considered by it in ruling on the motion to dismiss the independent plenary action** (II-R 135, 142, 143).

On June 19, 1944, in the independent plenary action, the Court granted defendant's motion to dismiss (III-R 12, 13).

6. The petition of the Reorganization Committee for construction of the Plan, and the motion of The Railroad Credit Corporation to dismiss the independent plenary action.

On June 21, 1944, the Court filed its corrected memorandum opinion and order in the reorganization proceeding, construing the Plan of Reorganization, ruling that the accommodation collateral furnished by The Western Pacific Railroad Corporation to The Railroad Credit Corporation was not exonerated by the allocation of securities to The Railroad Credit Corporation under the Plan of Reorganization, and directing counsel to submit a form of decree (II-R 98-108). The Railroad Credit Corporation, as defendant in the independent plenary action, then noticed its motion in that action to enter judgment in its favor, attaching to its notice of motion a proposed form of judgment. At the time and place noticed the Court made and filed its judgment in the form proposed (III-R 13-17). This judgment recites that The Railroad Credit Corporation's motion to dismiss

“was heard upon the complaint, defendant's motion, stipulations of the parties, and evidence introduced”,

was argued and submitted, and the Court being advised it is

“ORDERED, ADJUDGED AND DECREED that plaintiff take nothing by its complaint herein, and that this action be, and the same is hereby, dismissed, and that defendant have and recover of and from plaintiff its costs of suit herein, taxed in the sum of \$20.85.”

On September 16, 1944, The Western Pacific Railroad Corporation appealed from this judgment (III-R 117). This is the appeal in No. 10966. Meanwhile, on September 14, 1944, in the reorganization proceeding, the Court filed its formal decree disposing of the petition of the Reorganiza-

tion Committee (II-R 143-148). On October 13, 1944, The Western Pacific Railroad Corporation filed its notice of appeal from so much of that decree as determined that the accommodation collateral provided by it was not exonerated by the Plan of Reorganization (II-R 150, 151). The Railroad Credit Corporation appealed from other portions of the same decree. These are the appeals in No. 10,962.

It is apparent that the matters and showing before the District Court on the motion to dismiss the independent plenary action (No. 10,966) were exactly those before the Court on the petition for construction of the Plan, with the exception only of the complaint in the independent action and the motion to dismiss. The appellants from portions of the decree of September 14, 1944, in the reorganization preceeding (No. 10,962), were collaborating to get up a single record. It would contain the matters which were before the Court. There was no reason to duplicate them in No. 10,966. The parties stipulated, to avoid duplication, to incorporate by reference in No. 10,966 the record in No. 10,962. That this could be done was apparent from the designation of record on appeal filed by The Western Pacific Railroad Corporation in No. 10,966 (III-R 22-26). The major portion of the record desired was designated by reference to the designations filed in the reorganization matter, No. 10,962 (III-R 23, par. 3), and then the designation, Paragraph 13 (III-R 24-26), provides:

“The issues involved on the appeal of The Western Pacific Railroad Corporation in the above entitled matter” (the independent plenary action No. 10,966) **“are substantially the same as the issues involved in the appeal in”** the reorganization proceeding (No. 10,962) **“by** The Western Pacific Railroad Corporation

from the order construing Plan of Reorganization, made by this Court and filed on September 14, 1944, and are part of the issues raised by the appeal of The Railroad Credit Corporation from the same Order, filed October 13, 1944. For the purpose of shortening the record" appellants "have agreed to file, and will file, a stipulation that the Circuit Court of Appeals for the Ninth Circuit may make an order consolidating the appeal" with the appeal in No. 10,962 "for briefing, for oral argument and the purposes of the record * * * and providing that each and every item or part of the record on appeal" in No. 10,962 "shall be deemed a part of the Transcript of Record on" the appeal in No. 10,966. "When said stipulation * * * is filed herein and when said Order of the Circuit Court of Appeals * * * is filed in the above entitled action, then such stipulation and order are hereby designated for inclusion in the transcript of record hereby designated in lieu of the matters described and designated in Item 3 in this designation."

The parties made the stipulation contemplated by the designation. This Court made its order on that stipulation approving it and ordering accordingly (III-R 32-36). The stipulation recites the pendency of the reorganization proceeding, and that The Railroad Credit Corporation and The Western Pacific Railroad Corporation "appeared as creditors of the Debtor" in that proceeding (III-R 33). It then states a hearing was had on June 2, 1944, the making of the decree of September 14, 1944, and the taking of the appeals. It then recites the pendency of the independent plenary action, and provides:

"By stipulation of plaintiff and defendant the hearing of said action, and of a motion by defendant for

dismissal thereof, was heard by the District Court on June 2, 1944, and **in the same proceeding and upon the same showing, evidence and record**, except as to pleadings, as the hearing of the aforesaid petition of the Reorganization Committee in action #26,591-S." (This last reference is to No. 10,962.) (III-R 33)

It is then provided that the three appeals "be consolidated for briefing and for oral argument, and **may be heard upon the same record**"; that, since the independent plenary action (No. 10,966) "**was determined upon the same evidence and record**, except as to pleadings, and in the same hearing, **as the reorganization matter**" No. 10,962, "there need not be repeated and included in the Transcript of Record on appeal by The Western Pacific Railroad Corporation in said plenary action" No. 10,966 "any item or part of the record on appeal which may be included in the records on appeal in" No. 10,962; that any matter appearing in the record in No. 10,962 may be used by either of the parties in No. 10,966, i. e., "as matter included in the Transcript on Appeal in respect to either of the appeals hereby consolidated". The stipulation closes by providing that it shall be included in the record on appeal in No. 10,966 (III-R 32-36).

This matter has been stated at length because The Western Pacific Railroad Corporation seems to have forgotten it, and makes statements based solely upon allegations of its complaint in the independent action which are contradicted by the evidence and matters of record before the Court when it dismissed the complaint.

MATTERS URGED BY THE WESTERN PACIFIC RAILROAD CORPORATION ON ITS APPEALS

The appellant, The Western Pacific Railroad Corporation, seems to urge three points:

1. On the merits, the accommodation collateral furnished by it to The Railroad Credit Corporation was exonerated by the Plan; the Plan makes The Railroad Credit Corporation whole and satisfies and discharges its claim. The Railroad Credit Corporation is **not** made whole **in fact**. But this is immaterial because in **legal** contemplation it is made whole by the Plan, whatever the dollars and cents result to The Railroad Credit Corporation.

2. The Western Pacific Railroad Corporation was not a party to the Plan, and the property here involved—the accommodation collateral furnished by it—never having been the property of the Debtor, the District Court had no jurisdiction to construe the Plan and determine that the Plan did not, in legal contemplation, make The Railroad Credit Corporation whole. By consequence, whether the accommodation collateral was exonerated could be determined only in the independent action (No. 10,966).

3. In any event the District Court acted only as an arbitrator. In effect, by agreeing to the Plan, the parties to the Plan agreed that the District Court might so act, and this agreement carried with it the agreement they would not appeal from any determination by the District Court. (The effect of this is to say that this Court does not have jurisdiction of the appeal from the order made in the reorganization proceeding. How this helps appel-

lant The Western Pacific Railroad Corporation is not apparent. The Railroad Credit Corporation is not appealing from the parts of the order involved on the appeals of The Western Pacific Railroad Corporation. The latter is appealing. The Western Pacific Railroad Corporation is in no way interested in the phase of the order from which The Railroad Credit Corporation is appealing. We do not concede, however, that the District Court was acting as claimed. This is discussed below.)

In spite of points 2 and 3 above, **appellant states that it desires a determination on the merits** (see its Brief, pp. 9, 39). In this, at least, it is consistent with the way in which the matter was heard and disposed of in the Court below, with its consent and by stipulation, whether the merits be deemed to have been properly disposed of in the reorganization proceedings or in the independent action. (See pp. 6 to 10 above.)

III.

THE RAILROAD CREDIT CORPORATION WAS NOT MADE WHOLE, IN FACT OR IN LAW, AND THE ACCOMMODATION COLLATERAL HAS NOT BEEN EXONERATED.

Detailed Statement of the Position of The Western Pacific Railroad Corporation as Exposed in Its Brief.

The precise position taken by The Western Pacific Railroad Corporation is important not only in considering the merits of its claim, but as well in considering its claim that the District Court had no jurisdiction to dispose of the matter in the reorganization proceeding, and erred in dismissing the independent action.

There is no claim that The Railroad Credit Corporation has been made whole in fact. There is no claim that The Railroad Credit Corporation has in fact received in money, property, or securities, an equivalent in value of its claim against the Debtor. There is no evidence to support any such claim if it were made. (Compare *Union Trust Co. v. Willsea*, quoted in note 43, p. 40 below.) The Western Pacific Railroad Corporation says:

“We agree that there is no presumption that The Railroad Credit Corporation has been made whole, and we rely on no such presumption.” (Brief, p. 43)

To the contrary, The Western Pacific Railroad Corporation relies upon what it characterizes, in urging that the holders of First Mortgage Bonds were made whole, as a fiction (Brief, p. 37). Appellant’s **only** position is that, while The Railroad Credit Corporation has not been made whole in fact, the Plan makes it whole in legal contemplation, not only as to the Debtor, but as to third persons who furnished accommodation collateral.⁷ If doubt could

7. This is the way appellant’s Brief phases its position: The question is “whether by reason of **the provisions in the Plan of Reorganization** * * * this appellant is not now entitled to have returned to it as exonerated the accommodation collateral furnished by appellant.” (P. 9) The securities to be issued “were to be taken at the values fixed **by and in the Plan**”, and “were to be issued in full satisfaction of its [RCC] claim, and that thereby the accommodation collateral furnished and pledged by this appellant was exonerated and should be returned to appellant”. (P. 10) There is then an attempt to buttress the proposition, not by argument but by dogmatic assertion, as point II, pp. 18-28. One of the consequences of making The Railroad Credit Corporation whole was that the excess collateral was released and this was recognized by the Interstate Commerce Commission. (P. 33) “The Railroad Credit Corporation was made whole by an **allotment** of certain securities, including common stock which had no face value at all. But the Interstate Commerce Commission determined, and the District Court affirmed the determination, that The Railroad Credit Corporation, possessing no senior right, would be made whole by an **allotment** of the same stock at \$62.00 per share and without resorting to all of the collateral pledged by the principal Debtor.” (P. 43) “Our reliance is upon the facts of record as hereinbefore recited, which conclusively prove that The Railroad Credit Corporation has been made whole as a **matter of law**.” (Pp. 43, 44)

remain after the statements in its Brief, the complaint in the independent action demonstrates that it is indissolvably wedded to the theory that The Railroad Credit Corporation was made whole only in law as a result of construction of the Plan. This is discussed below at pp. 51, 52.

There are considerations of fact and of law which fully answer appellant's assertions. It seems more orderly to state all of the factual considerations at one place than to take them piecemeal as they apply to each proposition.

The Facts.

The source from which the facts are to be taken is the first important consideration. While the complaint in the independent action is made up almost wholly of conclusions of law,⁸ there are some statements in it which, taken alone, might be tortured into statements of ultimate fact. Appellant has endeavored to make use of some of these without discrimination—without differentiating discussion of its appeal from the order in the reorganization proceeding (No. 10,962) from discussion of its appeal from the judgment in the independent action (No. 10,966)⁹—as

8. Attempts to state the effect of the Plan and the action of the Commission and the courts. These are necessarily only legal conclusions in this complaint because the complaint, by reference, incorporates the action of the Commission and courts. See below.

9. These are allegations of the complaint, contradicted by the record which was before the Court, of which appellant endeavors to make use: The First Mortgage Bonds were secured by "a first and paramount lien on all of the properties" of the Debtor except, as found in the modified report of the Interstate Commerce Commission, properties of a value of \$1,879,965.00. (III-R 5). The allotment of securities, under the Plan, to the First Mortgage bondholders made them whole (in the Brief appellant argues at some points that they were made whole and then at other places contradicts this by the statement that they were not made whole) without exhausting the security under the first mortgage bonds and for giving up their preferred position and taking stock the First Mortgage Bondholders were compensated by having common stock given to them at a differential of \$5.00 below the figure at which it was given to The Railroad Credit Corporation. (III-R 7) Again, "this allotment of new securities made said defendant (The Railroad Credit Corporation whole". (III-R 7)

though they were conclusive of the facts. However proper this might be where a complaint was attacked by motion to dismiss, and there was nothing before the Court but the complaint and the motion, it is not proper on these appeals. First: The allegations of the complaint in the independent action were not before the Court, and had no bearing upon its determination in making its order in the reorganization proceeding. That order was made in view of the whole record, including the testimony taken at the hearing on June 2, 1944. Second: The complaint in the independent action (Paragraph IV, III-R 3, 4) made reference to and incorporated the reports of the Interstate Commerce Commission and the decisions of the District Court, this Court and the Supreme Court of the United States. In such circumstances allegations which attempt to state what the Plan did are mere conclusions and must be disregarded where unsupported by, or in conflict with, the Plan. Third: By stipulation, all matters before the Court in the reorganization proceeding were before the Court in passing on the motion to dismiss. (See p. 6 above.) The Court was not restricted to the complaint. It had the full story before it. Last: If appellant is sincere in its protestation that it wants a decision on the merits, there can be no excuse for relying on a pleading which is contradicted by the record. This Court should disregard the shadow and look to the substance. The substance appears in the records in No. 9714 (I-R) and No. 10,962 (II-R).

We turn, then, to the real facts.

The position of The Railroad Credit Corporation, the character and amount of its claim and the security held

by it, including accommodation security furnished by The Western Pacific Railroad Corporation, has been sufficiently stated. (See pp. 4, 5 above and Opening Brief of The Railroad Credit Corporation on its appeal, pp. 7 (including note 9), 11-18, 54, 55.)

It is not necessary again to recite the detail of how the Interstate Commerce Commission determined what new securities should be issued. This is fully covered in the reports of the Commission and the opinion of the Supreme Court of the United States (318 U.S. 448, 87 L.ed. 892; and see the Opening Brief of The Railroad Credit Corporation on its appeal, pp. 18-25).

The Commission first determined what new securities should be issued, without regard to who had claims, the nature of those claims, or the security held. It determined what the Debtor reasonably could be expected to earn, and, upon this basis, what new securities could be supported. It concluded that those earnings would justify only a given amount of fixed charges. Having determined what charges had a primary claim on anticipated income, it next allotted the remaining amount of justifiable fixed charges to interest-bearing bonds, capitalized this, and thus arrived at the amount of bonds to be issued. The prospects of income were such that additional securities could be issued. Accordingly, provision was made for income bonds. The Commission determined what anticipated income properly could be allotted for these and fixed the principal amount by capitalizing on a 4½% basis. Then, using the same method, it determined the proper amount of preferred stock, and, lastly, fixed on an amount of no-par common stock (i. e., number of shares) which, in its

opinion, the reasonably to be anticipated income would justify, after taking care of the senior securities.

Only after this had been done, the Commission addressed itself to allocation of these securities among the creditors. Only then was the character of the creditors' claims, and the security held by each, of significance.

Again, because of suggestions attempted, there should be no misunderstanding about how this allocation was made. Some of the material was set out in the Opening Brief of The Railroad Credit Corporation on its appeal, pp. 18-29. We hope to avoid repetition, but some amplification is necessary. The material for this is in the reports and orders of the Commission and in the opinion of the Supreme Court (318 U.S. 448, 87 L.ed. 892). The two matters to be noticed are (1) the determination of the relation between, and respective priorities of, holders of first mortgage bonds and holders of general and refunding mortgage bonds, and (2) determinations made that The Railroad Credit Corporation was not required to surrender its accommodation collateral.

The **original** report and order of the Commission of October 10, 1938 (I-R, 194 et seq.) dealt with both matters. In dealing with the respective priorities of the first mortgage and the general and refunding mortgage (I-R, 261-267), the Commission followed almost word for word the proposed report of its Bureau of Finance (see I-R, 175-189). This is the substance of the report: All three plans submitted to the Commission were "predicated on the priority of the existing first mortgage over the general mortgage." "The trustee under the first mortgage and the holders of bonds issued under that mortgage contend that

the first mortgage is a first lien on substantially all the debtor's property, except equipment subject to existing leases, conditional-sales agreements, or equipment-trust agreements. The general mortgage trustee and those creditors with whom general-mortgage bonds are pledged contend, however, that the first mortgage is not a lien, or is a lien only to the extent of the proceeds of first-mortgage bonds extended thereon, on cash and collateral held by the trustees under the general mortgage, on" specified property. These latter parties contended that the last mentioned property is "not only free from the lien of the first mortgage, but is subject to the lien of the general mortgage and that its value is sufficient for the full payment of all debts secured under the general mortgage" (I-R, 261, 262). These contentions were then discussed. The Commission concluded:

"While due recognition must be accorded to the rights of the creditors with whom are pledged the general-mortgage bonds, those creditors are not entitled to the same treatment as the first-mortgage bondholders, who should be considered as having a first lien upon practically all of the assets of the Debtor. It follows that holders of the Debtor's first-mortgage bonds should receive securities of a higher rank than those allotted to other creditors, at least to the extent that existing conditions will permit." (I-R, 267)

The holders of general-mortgage bonds were clearly entitled to priority over the unsecured claims (I-R, 267). The amounts of the various claims were discussed, demands on the Debtor's income were noticed, and from this it was said that

“it is clear that even though all securities remaining available for distribution after satisfying claims of the first-mortgage bondholders **are allotted to the other secured creditors, such securities will be inadequate to satisfy their claim.** For this reason, and for the reason stated with respect to the finding that the equity of the existing stock has no value, we find that the claims of the unsecured creditors * * * have no value * * *.” (I-R 269)

Again, after noticing the claims of the holders of general-mortgage bonds, and after having stated that they should receive only no-par stock, the Commission said:

“Having found that the 159,462 shares of common stock available for distribution **are inadequate in value to satisfy the aggregate claims of these parties,** it follows that it would be inequitable to distribute such stock in proportion that each claim bears to the total amount of such stock. The value of each of the claims is proportionate to the collateral securing it, and we find that the **allocation of the stock should be made on the basis of the collateral held rather than on the amount of the claims.**” (I-R 271)

The first of these last two quoted excerpts is quoted by the Supreme Court in its opinion (318 U.S. at 462, 87 L.ed. at 926).

In line with these findings, the Commission stated the proper allocation of new securities:

“Proceeding to the allocation of the available securities, the plan should provide that **all** of the new income bonds, \$19,716,040, principal amount, **all** of the new preferred stock, \$29,574,060 par value, and 154,241 shares of the new no-par-value common stock

should be allotted to the holders of existing **first-mortgage bonds**. The remaining 159,462 shares of no-par-value common stock should be allotted to the secured note holders on the basis indicated below.” (I-R 270)

The short of this is that the Commission concluded that the lien of the general-mortgage bonds was junior to the lien of the first-mortgage bonds and, accordingly, **all** the two classes of senior securities (bonds and preferred stock) were allotted to the holders of first-mortgage bonds and only the junior common stock was allotted, in part, to holders of general-mortgage bonds. The Commission’s original plan followed this allocation (J, I-R, 293).

The **original** report, order and plan also dealt with The Railroad Credit Corporation’s accommodation collateral. The Commission notices that The Railroad Credit Corporation held such collateral—an assignment of certain advances by The Western Pacific Railroad Corporation (I-R 226); that in the briefs in support of exceptions to the proposed report of the Bureau of Finance, the bondholders’ committee had proposed that the plan

“shall not prejudice the rights of The Reconstruction Finance Corporation or The Railroad Credit Corporation against collateral which has been delivered by third persons to secure the obligations of the Debtor and which does not itself constitute a claim against the Debtor or the Debtor-property.” (I-R 235)

The Commission’s conclusion was:

“The Plan should provide, however, that its approval and confirmation in no wise disturbs or alters the rights of The Reconstruction Finance Corporation

and The Railroad Credit Corporation in collateral pledged with them by parties other than the Debtor.” (I-R 271)

In the original plan, it was provided in subdivision O:

“The approval and confirmation of the plan shall in no wise disturb or alter the right or interest of the Reconstruction Finance Corporation and The Railroad Credit Corporation in collateral pledged with them by parties other than the Debtor.” (I-R 298)

The **supplemental** report of the Commission on further consideration was promulgated June 21, 1939 (I-R 300 et seq.). It, too, dealt with the subjects we have just noticed. Objections had been made to the first report and order and these were considered. The supplemental report is not a full report. It simply passed on the objections and modified the earlier report where necessary. The first report was not vacated. It was only modified and supplemented. This is clear from the tenor of the supplemental report as a whole. The report so states (I-R 354, 362). That the original report was not to be disregarded, but, to the contrary, was to be given proper consideration, is made clear by the opinion of the Supreme Court. (See, for example, 318 U.S. at 454, 87 L.ed. 921, note 2; 318 U.S. at 462, 78 L.ed. at 926; 318 U.S. at 488, 87 L.ed. at 940.)

One objection to the Commission's original report went to its conclusion of absolute and over-all priority of the first-mortgage bonds. This was reconsidered in the supplemental report (I-R 312, et seq.). The Commission said:

“Upon further consideration, we also are of the opinion that the value of the assets pledged under

the general and refunding mortgage upon which that mortgage admittedly constitutes a first lien requires a re-examination of the allocation of new securities * * *. These assets consist of cash in the hands of the mortgage trustee amounting to \$223,732",

and a note and stock of Tidewater Southern Railway Company, and other assets. **The conclusion was that the note and stock of the Tidewater Southern had substantial value** (I-R 312-315). The ultimate conclusion was:

"From the foregoing, it appears that the creditors secured by the general and refunding mortgage bonds should be awarded new income mortgage bonds in the amount of \$732,010, and new participating preferred stock of a par value of \$1,147,955. Applying to these amounts the proportioned amounts of general and refunding mortgage bonds securing the notes of the Finance Corporation, The Credit Corporation, and The James Company",

the Commission made the ultimate allocation which appears in the final plan of reorganization, subdivision P (Opening Brief of The Railroad Credit Corporation on its appeal, p. 26, et seq.). The report itself recognized that the modification of the earlier report required this new allocation.

"The above modifications require further modification of our prior report and order with respect to the allocation of the reorganization securities." (I-R 316)

The opinion of the Supreme Court recognized the ultimate conclusion; recognized that "the later general and refunding mortgage bonds, \$18,999,500 in face amount, are secured by a **first lien** on properties determined by the

Commission to be of a value and earning power sufficient to support" the issues of new income bonds and preferred stock allocated to the holders of the general and refunding mortgage bonds and, speaking of these bonds, went on:

"They are further secured, subject to the prior rights and other exceptions of the obligations listed in the preceding paragraph, **by a lien on all valuable property of the Debtor.**" (318 U.S. at 456, 87 L.ed. at 922)

Again, speaking of the allocation of income bonds, the Court said:

"Some of these bonds, on the other hand, go to creditors secured by the refunding bonds. **This is because the refunding bonds have a first lien on some assets.**" (318 U.S. at 484, 87 L.ed. at 938)

Again:

"Here it is sufficient to say that as determined by the Commission, **the Refundings had a lien superior to the Firsts on some assets** (233 Inters. Com. Red. F. 414), and the Firsts superior over the Refunding on the major portion." (318 U.S. at 488, 87 L.ed. at 940)

Since the refunding bonds were a first lien on certain assets, those bonds had an absolute priority as to **such** assets. Since the refunding bonds were a general lien on **all** of the valuable assets of the debtor, subject only to the prior lien of the Firsts, if the assets subject to the prior lien of the Firsts were sufficient to satisfy the Firsts, the value remaining, if any, constituted value under the refunding bonds. **But** whether the holders of first-mort-

gage bonds were made whole or not—whether there was any value left after applying to the first-mortgage bonds the value of all property upon which those bonds had a first lien, to the extent necessary to make the holders of the Firsts whole, or not—it is clear that the assets upon which the refunding bonds had a first lien plus residual value, if any, after exhausting the lien of the first-mortgage bonds **was not sufficient to discharge the obligations secured by the refunding bonds or to make whole the creditors who held refunding bonds as security.**

In the first place it is abundantly clear that there was nothing left over for unsecured claims and that unsecured claims were valueless (Opening Brief of The Railroad Credit Corporation on its appeal, pp. 19, 20). But, more important, the Commission found that the holders of refunding bonds did not have a lien on security sufficient to make them whole and that they would not be made whole. The Commission found (I-R 271), and this finding is quoted by the Supreme Court (318 U.S. 462, 87 L.ed. 926), that

“it is clear that even although all the securities remaining available for distribution after satisfying the claims of the first-mortgage bondholders are allotted to the other secured creditors, **such securities will be inadequate to satisfy their claims.**”

Moreover, as we demonstrated in the Opening Brief of The Railroad Credit Corporation on its appeal, p. 16, et seq., The Railroad Credit Corporation had a second lien on the \$10,750,000 refunding bonds held by Reconstruction Finance Corporation; Reconstruction Finance Corporation's claim of \$3,682,869.98 exhausted this security and

other security, too; and, by consequence, these same bonds in the hands of The Railroad Credit Corporation in the principal amount of \$4,000,000 could not have a value of more than \$1,437,346. Since the allocation of new securities was not upon the basis of the amount of the creditor's claim, but was on the basis of the value of the security held by the creditor (Opening Brief of The Railroad Credit Corporation on its appeal, p. 18 et seq.), The Railroad Credit Corporation was not entitled to have distributed to it securities which would represent more in value than the security it held, i. e., \$1,437,346. By the distribution of such new securities it could not possibly be made whole.

On the matter of accommodation collateral held by The Railroad Credit Corporation, it is true that the Plan of Reorganization itself (reading only the **Plan** and disregarding the rest of the order in which the Plan is contained) has no affirmative statement. But it is **not** true that the **order** which contains the Plan is silent on the subject of accommodation collateral. That order recites the making of the original report and order of October 10, 1938, and then recites the further consideration and the making of the supplemental report "**which report is hereby referred to and made a part hereof**" (I-R 362, 363). That supplemental report, so incorporated by reference in the order of June 21, 1939, contains the following:

"Under the Bondholders' Committee's modified plan,
 * * *. All collateral pledged by others than the Debtor as security for the Debtor's note to the Finance Corporation, Credit Corporation, and James Company would be surrendered to the pledgors thereof * * *. Conclusion.—We do **not** approve that part of the foregoing provisions which states that all collateral

pledged by others than the Debtor as security for the Debtor's notes to the Finance Corporation, Credit Corporation, and James Company would be surrendered to the pledgors thereof. With this provision eliminated, we approve the foregoing provisions." (I-R 344, 345)

Appellant's Brief, p. 5, points out that questions were raised as to the status of accommodation collateral pledged by persons other than the Debtor, and says: "No provision with regard to such collateral was included in the **Plan** of Reorganization." If this statement is given a most limited and restricted construction, and so construed can be said to be correct, it is only a half truth as a statement of fact. It is incorrect as matter of law. "The Commission's order must be read against the background of the record" (*Penn. R. Co. v. U. S.*, 55 F.Supp. 473, 489,—Dist. Ct. N.J.,—3 Judge Dist. Ct.). When, as here, the Commission uses its standard form of order which refers to its report and says the "report is hereby referred to and made a part hereof," the report becomes part of the order and the order must be read in connection with the report. (*Gulf etc. Co. v. Ill. C. R. Co.*, 21 F.Supp. 282, 289, col. 1, and cases cited¹⁰ (Dist. Ct. Tenn.), app. dis. 109 F.2d 1016 (C.C.A. 6); *American Express Co. v. So. Dak. ex rel. Caldwell*, 244 U.S. 617, 626, 61 L.ed. 1352, 1359, col. 1.)

The opinion of the Supreme Court determines the effect to be given to the action of the Commission. (See 318

10. "The order of the Commission, however, expressly refers to and makes the report of the Commission, containing its findings of fact and conclusions thereon, a part of the order. Both the report and the order were filed on May 22, 1933. The order must be read in connection with the report. (*Georgia Public Service Commission v. U. S.*, 283 U.S. 765, 75 L.ed. 1397; *Illinois Commerce Commission v. U. S.*, 292 U.S. 474, 78 L.ed. 1371; *Beaumont S. L. & W. Ry. Co. v. U. S.*, 282 U.S. 74, 75 L.ed. 221)"

U.S. 503-506, 87 L.ed. 947-949.) The Court quotes the original order that the rights of The Railroad Credit Corporation "in collateral pledged with them by parties other than the Debtor" should not be disturbed or altered". It goes on:

"On consideration of the petitions for modification of this order, the Commission refused to direct that this collateral be 'surrendered to the pledgors thereof'."

Again, referring to accommodation collateral, pledged by others than the Debtor, the Court said:

"This collateral, other than refunding bonds, was therefore **left** with the **pledgees** with its position unaffected by any direct action of the Commission * * *. Of course, the collateral loan to the Debtor which was not an obligation of the Debtor could not be ordered by the Plan to be cancelled. **It remained with the pledgees.** * * * The A. C. James Company unsecured claim against the Debtor for the loan of the bonds is valueless, 233 Inters. Com. Rep. (f) 452, and the Plan does not deal with any possible claim of accommodation pledgors against the pledgees of bonds which were not the property of the Debtor."

The Plan of Reorganization Did Not, as Matter of Law, Make The Railroad Credit Corporation Whole and Exonerate the Accommodation Collateral Held by It, Where Its Claim Was Not Fully Satisfied in Fact, but, to the Contrary, Such Claim Is Squarely Contradicted by the Order of the Interstate Commerce Commission itself.

The Plan of Reorganization certainly did not contain any express provision that the allocation of securities under the Plan should operate or be deemed, as matter

of law, to make The Railroad Credit Corporation whole and exonerate the accommodation collateral held by it. (Some plans have stated that the new securities were to satisfy the claims or discharge guarantors. See notes 38, 43 and 44 below.) It is not claimed that the Plan had any such express provision. To the contrary, the first step in the argument is that the Plan is silent; that "no provision with regard to collateral was included in the Plan of Reorganization" (Appellant's Brief, p. 5).

While it may be true literally that there was no provision in the "Plan", it is also literally true that there was a provision in the "Order" of the Commission touching the accommodation collateral. That order referred to and incorporated the report. The effect was a specific and express refusal of a demand that the accommodation collateral be returned. The Commission considered the matter and expressly determined that neither by direct order, nor by effect of the Plan, was The Railroad Credit Corporation to return the collateral to the Pledgors. To use the language of the Supreme Court, the Commission refused to direct that the collateral be surrendered; it was "**left** with the **pledgees**, with its position unaffected by **any** direct action of the Commission." We need not repeat what has just been gone over at some length. (See pp. 20 to 27 above.)

This without more should be enough to dispose of the appeal on the merits. In the language of the court below:

"The Western Pacific Railroad Corporation is attempting to do what the Supreme Court said could not be done **by the Plan**." (11-R 197)

Final Confirmation of a Plan of Reorganization Under Section 77 Does Not, by Force of the Statute, Exonerate Accommodation Collateral.

Given the two propositions (1) that The Railroad Credit Corporation was **not made whole in fact**, and its claim against the Debtor was not **in fact** satisfied, and (2) that the Plan itself does not provide that it, or distribution of new securities under it, shall operate in legal contemplation to make The Railroad Credit Corporation whole, satisfy its claim, and exonerate accommodation collateral, the question still remains whether the Plan, or its operation, discharging the **Debtor**, by force of the statute operates to discharge accommodation collateral.

The Plan itself contains **no** statement that the **claim** of the Railroad Credit Corporation, even as to the Debtor, is released, discharged or satisfied, or other words to that effect. Subdivision R provides that the capital stock of the Debtor, and the unsecured claims "shall be cancelled." It further provides that "existing mortgages on the **Debtor's** property shall be released and cancelled, and all funds on deposit with the Trustees on the Debtor's mortgages * * * and all collateral pledged under the **Debtor's** mortgages shall be surrendered to the reorganized company free from lien of the Debtor's mortgages" (II-R 394). If the Debtor, by reason of the confirmation and carrying out of the Plan, acquired any defense to the **claims** against it, that of The Railroad Credit Corporation included, it must be by force of the statute. If the **claims** of The Railroad Credit Corporation (as distinguished from the security held by it) is in any way affected, it is only by force

of the statute and only to the extent and in the way the statute provides.

So far as the statute is concerned, the only effect of confirmation and carrying out of the Plan of Reorganization is to give the **Debtor** (but no one else) a personal defense. These are the relevant provisions of the Bankruptcy Act:

Section 77(f) provides:

“The **property dealt with by the Plan**, when transferred and conveyed to the Debtor or to the other corporation or corporations provided for by the Plan, or when retained by the Debtor pursuant to the Plan, shall be free and clear of all claims of the **Debtor**, its stockholders and creditors, and the **Debtor** shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the Plan be reserved in the order confirming the Plan or directing such transfer and reconveyance or retention

* * * ”¹¹

Section 77(l) provides:

“In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the Debtor and the rights and liabilities of creditors, and of all persons with respect to the Debtor and its property, shall be the same as if a voluntary petition for adjudication

11. This provision is no broader than that contained in the sections dealing with bankruptcy in general. Section 1 provides: “ ‘Discharge’ shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this act.” Section 17 provides: “A discharge in bankruptcy shall release a bankrupt of all of his provable debts, whether allowed in full or in part, except such as” and the exceptions are then specified.

had been filed and a decree of adjudication had been entered on the day when the Debtor's petition was filed."

Section 16(a) provides:

"The liability of a person who is a codebtor with or guarantor or in any manner a surety for a bankrupt shall not be altered by the discharge of such bankrupt."

There were provisions like §16 in the Acts of 1800,¹² 1841¹³ and 1867¹⁴ and decisions under the earlier acts may still be looked to. (See 1 *Collier, Bankruptcy*, 14 ed. §16.01. Cf. *Zavela v. Reeves*, 227 U.S. 625, 630, 57 L.ed. 676, 678, col. 2.)

Even in the absence of such a provision as that in §16(a), accommodation collateral securing a claim against a bankrupt debtor is not released by final disposition¹⁵ of a proceeding under the bankruptcy act because of the very limited nature of those dispositions. The only effect of final disposition of a proceeding under the bankruptcy act is to give the debtor or bankrupt a personal defense,—**personal to him**,—which he may set up if sued upon a claim that has been discharged; of which he can avail

12. Section 34 provided: "That no such discharge of a bankrupt shall release or discharge any person who was a partner with such bankrupt, at the time he or she became bankrupt, or who was then jointly held or bound with such bankrupt for the same debt or debts from which such bankrupt was discharged as aforesaid."

13. Section 4 provided: "That no discharge of any bankrupt under this act shall release or discharge any person who may be liable for the same debt as a partner, joint contractor, endorser, surety, or otherwise, for or with the bankrupt."

14. Section 33 provided: "* * * and no discharge granted under this act shall release, discharge, or affect any person liable for the same debt, for or with the bankrupt, either as partner, joint contractor, endorser, surety, or otherwise."

15. We say "disposition" because the same rule applies to discharges in bankruptcy, compositions under the bankruptcy act and reorganizations under the bankruptcy act.

himself **only** by setting it up affirmatively; a defense which the debtor or bankrupt waives if he fails affirmatively to plead it.

Helms v. Holmes, 129 F.2d 263, 265, 266, 141 A.L.R. 1367 (C.C.A. 4);¹⁶

First National Bank v. Henderson, 243 Ala. 636, 11 So.2d 366;¹⁷

Amer. Improvement v. Lilienthal, 43 Cal.App. 80, 184 P. 692 (hr. den.);

Winter v. Trepte, 234 Wis. 193, 290 N.W. 599;¹⁸

Moyer v. Dewey, 103 U.S. 301, 26 L.ed. 394;

Feltner v. Hoskins, 248 Ky. 697, 59 S.W.2d 974;¹⁹

Way v. Barney, 116 Minn. 285, 133 N.W. 801;²⁰

Gurley v. Robertson, 178 Ala. 326, 59 So. 643;

Glenn, Surety's Right to Indemnity, 31 Yale L. Jour. 582, 584.

“The theory is that the discharge destroys the remedy, but not the indebtedness.” (*Zavelo v. Reeves*, 227 U.S.

16. Held, that a Federal Court would not enjoin execution on a default judgment obtained against a bankrupt who, by defaulting, neglected affirmatively to set up his discharge in bankruptcy; that the defense must be pleaded and is waived by failure to plead it.

17. Defense of discharge in bankruptcy is waived if not pleaded.

18. This case involved not a discharge in bankruptcy but a reorganization under §77B.

19. The court noticed that under §16 “the liability of a person who is jointly liable with the bankrupt for a debt is in no way released or impaired by reason of the discharge of the bankrupt” and then said: “The intention and purpose of the statute is to make a discharge of a bankruptcy personal to the bankrupt and not to release any other party who may in any way be liable with him.”

20. Here the rule is applied to hold that liens are not released or affected by discharge in bankruptcy. “The discharge of a debtor in bankruptcy does not extinguish the debt, but relieves him from all legal obligation to pay it, leaving unimpaired all remedies for securing payment thereof out of property upon which it is a lien. *Hill v. Harding*, 130 U.S. 699, 32 L.ed. 1083; *Evans v. Stalle*, 88 Minn. 253, 92 N.W. 591; *Leitch v. Railway Co.*, 95 Minn. 35, 103 N.W. 704.” This case held that discharge of a corporation did not release stockholders’ liability.

625, 57 L.ed. 676, followed in *First National Bank v. Henderson*, *supra*; *First National Bank v. Pothuisje*, 217 Ind. 1, 25 N.Ed2d 436.) The discharge "is neither a payment nor an extinguishment of debts. It is simply a bar to their enforcement by legal proceedings." (*Helms v. Holmes*, *supra*; *Livesay v. First National Bank*, 57 S.W.2d 86, 91 A.L.R. 873 (Tex. Com'n of Appeals);²¹ *Burtis v. Wait*, 33 Kans. 478, 6 P. 783, 785.²² See *Glenn, Surety's Right to Indemnity*, 31 Yale L. Jour. 582, 584.)

The same rule has been applied to a composition under the bankruptcy act—there is no "payment or extinguishment of the debts" but only a bar to remedies. (*American Improvement Co. v. Lilienthal*, *supra* (holding that security was not affected); *In re Kornbluth*, 65 F.2d 400, 402, 403 (C.C.A. 2).)

In view of §16, there can be no doubt that final disposition of a proceeding under the bankruptcy act does not affect the creditor's rights against any person or thing other than the debtor or bankrupt himself. (See *Glenn, Surety's Right to Indemnity*, 31 Yale L. Jour. 582, 584; note 31 Col. L. Rev. 1348, 1353.) The rule has been applied in a wide variety of circumstances, and to discharges in bankruptcy, compositions and reorganizations:

Endorsers:

Myers v. International Trust Co., 273 U.S. 380, 71 L.ed. 692;²³

21. Here it was held that the proceeding under the bankruptcy act did not destroy an insurable interest in the debtor's life.

22. Held, that the proceeding under the bankruptcy act did not satisfy the debt and did not release a mortgage on the property of a third person given as accommodation security for the debt.

23. A composition under the bankruptcy act by a partnership did not release the individual liability of the partners as endorsers.

Winter v. Trepte, 234 Wis. 193, 290 N.W. 599;²⁴
B. M. C. Durfee Trust Co. v. Steiger, 296 Mass. 136,
 4 N.E.2d 1014;
Luther v. Lemons, 210 N.C. 278, 186 S.E. 369.²⁵

Transferee of Mortgaged Property

Who Assumed the Mortgage:

Security Savings Bank v. Scott, 3 Cal.App. 687, 86
 P. 903.

Guarantor of Rent:

Central National Bank v. Mills, 62 Ohio App. 413,
 24 N.E.2d 607 (cert. den. 313 U.S. 593, 85 L.ed.
 1547).²⁶

Maker of a Bond to Pay Railroad Tariffs:

Johnston v. Missouri Pac. R. Co., 203 Ark. 1036, 160
 S.W.2d 39.

Makers of Various Forms of Bonds:

Hill v. Harding, 130 U.S. 699, 703, 32 L.ed. 1083,
 1084;
Rosenthal v. Nove, 175 Mass. 559, 56 N.E. 884;
State v. Oakley, 129 Wash. 553, 225 P. 425, 428.²⁷

Liability Insurer:

Miller v. Collins, 328 Mo. 313, 40 S.W.2d 62.

24. Reorganization under Section 77B.

25. The creditor filed his claim and received and retained a bankruptcy dividend.

26. Reorganization under Section 77B. Under the plan the creditors were to take stock and the creditor in question accepted his allotment of stock.

27. A creditor filed his claim and received and retained a bankruptcy dividend.

*Co-Debtors, Whether Liable as**Principals or as Sureties:**Helms v. Holmes, supra;**Abendroth v. Van Dolsen*, 131 U.S. 66, 33 L.ed. 57;*Vandenburgh v. Goodfellow*, 19 C.2d 217, 225, 120 P.2d 20;*Feltner v. Hoskens, supra;*²⁸*First National Bank v. Kinslow*, 2 C.A.2d 456, 459, 38 P.2d 136;²⁹*Bass v. Geiger*, 73 Fla. 312, 73 S. 796, cert. den. 244 U.S. 653, 61 L.ed. 1373;³⁰*First National Bank v. Hoffman*, 102 Kans. 465, 171 P. 13;*Buckeye etc. Bank of Protogere*, 250 Mich. 252, 231 N.W. 65.³¹*Transferee of Property Transferred**by the Bankrupt in Fraud of Creditors:**Moyer v. Dewey*, 103 U.S. 301, 26 L.ed. 394.

And the same rule applies to the property of third persons which is provided as accommodation security for the debt of the bankrupt or debtor:

*Burtis v. Wait, supra;*³²*Post v. Losey*, 111 Ind. 74, 12 N.E. 121;³³*In re American Paper Co.*, 255 F. 121 (D.N.J.).

28. It was immaterial that the co-debtor was a surety only.

29. Accommodation co-maker was not released.

30. Composition under the bankruptcy act did not release accommodation co-maker of a note.

31. In this case and in *First National Bank v. Hoffman*, it was immaterial that the creditor had received part payment by a bankruptcy dividend.

32. Here a wife mortgaged her separate property. She did not execute the note.

33. Here the person providing the security became a co-maker of the principal obligation.

Cf.:

Chickasaw Hotel Co. v. C. M. Barker Const. Co.,
135 Tenn. 305, 186 S.W. 115;

First National Bank v. Pothuisje, *supra*;

Kolakowski v. Cyman, 285 Mich 585, 281 N.W. 332.

The creditor's rights against third persons are not prejudiced because he does not file a claim in the bankruptcy proceeding. "Nor is the creditor prejudiced by filing of his claim or by accepting a dividend on liquidation in bankruptcy of the debtor's estate or in a composition under the former composition provisions of the bankruptcy act." (1 *Collier, Bankruptcy*, 14th Ed. §16.05.) The rule was applied in the following cases, elsewhere cited in this brief: *First National Bank v. Hoffman*, *supra*; *Buckeye, etc. Bank v. Protogere*, *supra*; *State v. Oakley*, *supra*; *Luther v. Lemons*, *supra*; *Kolakowski v. Cyman*, *supra*; *Gurley v. Robertson*, *supra*.

Appellant suggests that The Railroad Credit Corporation, in some way, not clear to us, estopped itself by participating in the reorganization proceedings; that it waived its rights; that by consent it changed the surety's position. The suggestion is made without supporting authority. The suggestion is not a new one. It has been made and met before "where there are compositions under the bankruptcy act and where there were reorganizations". The composition cases seem stronger than the reorganization cases because the composition partakes more of the nature of a contract and proceeding outside the bankruptcy proceeding itself than does the reorganization.

The leading composition case is *Myers v. International Trust Co.*, 273 U.S. 380, 71 L.ed. 692. The holding was

that a composition by a partnership did not relieve the partners of individual liabilities by reason of individual endorsements. The Court said that it was settled by its decisions

“that a composition is ‘a settlement of the bankrupt with his creditors’—in a measure superseding and outside of the bankruptcy proceedings,—which originates in a voluntary offer by the bankrupt, and results, in the main, from voluntary acceptance by his creditors; that the respective rights of the bankrupt and the creditors are fixed by the terms of the offer; and that upon the confirmation of the composition they get what they ‘bargain for’ and no more.”

It was held, nevertheless, that the composition with the partnership did not extend to the individual partners and did not release them as endorsers.

“The necessary result is that the confirmation of the composition merely discharged the partnership debts, and did not discharge the separate debts of the partners to their individual creditors, who were offered and received no consideration for such release.”

In *Guild v. Butler*, 122 Mass. 498, 23 Am.Rep. 378 (noticing the English cases); *Barker v. Ackers*, *infra*, note 40, p. 40; *McClintic-Marshall Co. v. New Bedford*, note 35, p. 38 below; and *In re Kornbluth*, 65 F.2d 400, 402 (C.C.A. 2), the court noticed the distinction between a settlement between debtor and creditor, which was wholly voluntary, where the release of the debtor was solely by act of the parties, and a composition under the bankruptcy act where the discharge of the debtor was worked by operation of

law. (See, also, *Glenn, Surety's Right to Indemnity*, 31 Yale L. Jour. 582, 586.) In the *Kornbluth Case* the court said:

"Judicial analysis of the nature of a composition in bankruptcy has proceeded along the lines indicated, and has almost uniformly given a composition in bankruptcy the effect of a discharge in bankruptcy, rather than that of a composition outside of bankruptcy * * *. Likewise, an ordinary composition of a principal's debt, resting as it does in contract, is generally held to release the surety, whereas a discharge in bankruptcy does not. Accordingly, composition in bankruptcy has been universally held not to discharge the surety."

(Citing cases)

See, further, as to the effect of a composition under the bankruptcy statute, the following:

Bass v. Geiger, supra;

Barker v. Ackers, 29 C.A.2d 174, 175, 84 P.2d 264 (hr. den.);

Dunham Bros. Co. v. Colp, 125 Me. 211, 132 A. 388;

Martin Furniture Co. v. Massey, 135 Tenn. 338, 186 S.W. 451;³⁴

McClintic-Marshall Co. v. New Bedford, 239 Mass. 216, 131 N.E. 444;³⁵

Pacific Bank v. Michaelson, 216 App. Div. 120, 214 N.Y.S. 715;

34. The creditor voted for the plan and had accepted the shares of stock distributable to him under it.

35. The creditor accepted the composition offer. It was held that the composition barred remedies, but the debt was not paid or extinguished. "A composition under the bankruptcy act is entirely different from a voluntary composition deed. A discharge in bankruptcy is not by the agreement of the parties, but by operation of law, and is binding on the parties, not by reason of their consent, but by force of the statute."

Easton Furniture Mfg. Co. v. Cominez, 146 App. Div. 436, 131 N.Y.S. 157;³⁶
A. Klipstein Co. v. Lipschitz, 130 Misc. 291, 223 N.Y.S. 822.³⁷

The same rules apply and the same results are reached in the cases considering the effect of corporate reorganizations under the bankruptcy act. We are not aware of any cases under Section 77. But there have been a number of decisions considering the effect of a reorganization under Section 77B. Section 77B had a provision like Section 77(1) providing that "all other provisions of this act, except such as are inconsistent with the provisions of this section, shall apply to proceedings instituted under this section". The uniform holding has been that §16 is applicable to reorganizations.

In re Diversey Bldg. Corp., 86 F.2d 456 (C.C.A. 7—cert. den. 300 U.S. 662, 81 L.ed. 870);³⁸

In re Nine North Church Street, 82 F.2d 186 (C.C.A. 2);

In re Prudence Co., 55 F.Supp. 464 (E.D. N.Y.);³⁹

36. The creditor agreed to the composition in this case and in the *Pacific Bank Case*.

37. The rule is stated although not necessary to the decision because the guarantor consented.

38. One Becklenberg had guaranteed corporate bonds. The plan of reorganization provided for the issuance of new bonds and for release of Becklenberg's guarantee provided that he would guarantee the new bonds. Held, that the court could not enjoin a creditor who had not assented to the plan from suing on the old guarantee. The court had no power to release the guarantor. Here the plan affirmatively and in terms purported to release the guarantor. It is only fair to notice that in *Stoll v. Gottlieb*, 305 U.S. 165, 171, note 8, 83 L.ed. 104, 108, note 8, reh. den. 305 U.S. 675, 83 L.ed. 437, the court left this matter open: "We express no opinion as to whether the Bankruptcy Court did or did not have jurisdiction of the subject matter." The court notices the *Diversey Bldg. Corp. Case*, *In re Nine North Church Street*, *supra*, and the *Willsea Case*, *supra*.

This precise question we do not reach in the case at bar because the Plan did not attempt to release the accommodation collateral. To the contrary, a suggestion that the accommodation collateral should be returned to the original pledgors was expressly rejected. (See pp. 20 to 27 above.)

39. The plan expressly reserved rights under a guaranty. The creditor accepted new securities under the plan.

- Barker v. Ackers*, 29 C.A.2d 162, 173, 84 P.2d 264 (hr. den.);⁴⁰
- Mazur v. Stein*, 314 Ill.App. 529, 41 N.E.2d 979;⁴¹
- B. M. C. Durfee Trust Co. v. Steiger*, 296 Mass. 136, 4 N.E.2d 1014;⁴²
- Union Trust Co. v. Willsea*, 275 N.Y. 164, 9 N.E.2d 820, 112 A.L.R. 1175;⁴³

40. The question here was whether stockholders' liability was released by a plan of reorganization. The note holders' protective committee agreed to the plan, and from this it was argued that they had lost their right to proceed on the stockholders' liability. The court said: "The very purpose of the stockholders' liability and the only value in it is the protection it affords when the debtor corporation itself is unable to met its obligations. It must be noted also that there is a difference between a common-law composition and a composition in bankruptcy. In the former the creditors voluntarily release the principal debtor and therefore release codebtors, while in the case of a bankruptcy composition the discharge is by operation of law and not by act of the creditor who assents to the composition. Upon the institution, as in the instant case, of proceedings for corporate reorganization under Section 77B of the Bankruptcy Act, the creditor is forced to cooperate in the proceedings for a composition or a corporate reorganization, for whether or not he appears or consents to a composition or corporate reorganization, the bankrupt or debtor, as the case may be, may be discharged. The creditor is without choice but to attempt to obtain or assent to the composition or plan of reorganization which he deems the most favorable."

41. Section 16 was held to apply under Section 77B.

42. The creditor accepted the plan reserving his rights against an endorser. Under the plan the creditors were to get cash and stock. The creditor in question accepted this "in full satisfaction of its claim against the maker" of the note. If as matter of law accepting the plan and accepting the cash and new securities distributable under it would release an endorser it would seem clear that the attempted reservation of rights, being inconsistent, would be of no effect. However, such reservation of rights being in harmony of the rule of law, no harm was done. The case was not turned on the attempted reservation of rights.

43. A plan of reorganization was carried out. The creditor in question was active in the proceedings and accepted the stock distributable under the plan. The order expressly stated that the stock should be payment. Held, that a guarantor was not released. Composition cases are applied by analogy. The reorganization proceeding did not affect the independent guarantee agreement. "The proceeding under Section 77B is subject to all other applicable provisions of the Bankruptcy Act * * *. Section 16 (11 USCA §34) thereof expressly provides that the liability of one who was a guarantor or surety for a bankrupt shall not be altered by the discharge of such bankrupt. By analogy, the cases are applicable which hold that a composition in bankruptcy between a principal debtor and holders of instruments issued by it, does not discharge the liability of endorsers, sureties, or guarantors upon such instruments, even though they participate in the composition proceeding as creditors of the principal debtor and accept dividends on the instrument from the maker. Respondent, in accepting the new stock, did not accept it as payment or partial payment of its claim. There is no allegation in the answer as to the value of the stock. For all that appears, it may not have any value."

Seixas v. Hegeman, 158 Misc. 560, 285 N.Y.S. 838,
aff'd 246 App. Div. 813, 287 N.Y.Supp. 331;

Central National City Bank v. Mills, 62 Ohio App.
413, 24 N.E.2d 607, cert. den. 313 U.S. 593, 85 L.ed.
1547;⁴⁴

Winter v. Trepte, 234 Wis. 193, 290 N.W. 599;⁴⁵

*Finletter, Principles of Corporate Reorganization in
Bankruptcy* (1937), p. 378 et seq.;

Finletter, The Law of Bankruptcy Reorganization
(1939), p. 409 et seq.

It would be extraordinary to have the release of the Debtor operate to release accommodation collateral. The giving of accommodation collateral presupposes that the creditor is not willing to make an advance unless it is secured. It further presupposes that the debtor has no ade-

44. A creditor took stock of a debtor under a plan of reorganization. The court's order provided that the stock should be payment. Held, that a guarantee of rent was not released. The argument which is made in the case at bar was rejected. The court noticed Section 16a and held that under it the guarantee was not released. The court said: "If that debtor has a perfectly solvent guarantor or surety, we see no reason why the debtor's discharge in bankruptcy should deprive the creditors of the benefit of the security he has taken, possibly for the very reason that the principal debtor was of doubtful responsibility."

45. In a reorganization proceeding, stock was distributed to the holder of bonds. The order purported not to effect payment of the bonds or to discharge the liability of the guarantor. The doctrine of release of a surety by release of the principal was held not to apply because release of the principal was by operation of law. "Neither this plan nor the act of the owners of the bonds nor their predecessors thereto extinguishes the original debt or discharges the guarantors from their liability under the guarantee." As a basis for its holding the court said: "The reasons underlying this rule are that the entire matter is subject to the control of the bankruptcy court and intended for the relief of insolvent debtors, who are the only ones to be discharged, and that whatever is done to the debt is done by operation of law and does not constitute a release by the creditor. The debt itself is not extinguished. The discharge of the bankrupt forms a personal defense to him against further litigation on the debt declared upon in the bankruptcy proceeding. Being but a personal defense, it is not available to anyone else. Starting with the admitted fact that in bankruptcy the guarantor or surety is not discharged by the release of the bankrupt, it follows that in the absence of payment no release of the guarantors can be claimed. This is because the creditor does as he is required to do under the provisions of law. Whatever results were produced by the reorganization proceedings were accomplished by operation of law and not by the voluntary acts of the creditor."

quate security to give and for this reason it must be furnished by the third person. The transaction on its face discloses to the giver of the accommodation collateral, and he contemplates, that the Debtor may be unable to meet the claims against it, that its property will not satisfy those claims and that, in a proceeding under the Bankruptcy Act, the creditor will not be fully satisfied. The very purpose of giving the accommodation collateral is to meet this situation,—to permit the creditor to resort to the accommodation collateral in the event of such difficulties. The discharge of the Debtor in a proceeding under the Bankruptcy Act, without satisfaction of the creditor **in fact**, is the very reason for accommodation collateral. It would be most extraordinary to have it exonerated by the very eventuality against which the pledgor of the accommodation collateral designed it to give protection. (See *Central National Bank v. Mills*, quoted in note 44 above; *Barker v. Ackers*, quoted in note 40 above, and *In re Nine North Church Street*, 82 F.2d 186, 188, col. 2 (C.C.A. 2).)

A Consideration of Various Suggestions Made by Appellant Will Demonstrate That They Are Wide of the Mark.

Appellant suggests that because the Railroad Credit Corporation participated in the reorganization proceedings it is estopped to claim that it was not made whole and, by its conduct, having changed the position of the principal debtor, the accommodation collateral was released. There is no attempt to show that any conduct of The Railroad Credit Corporation in fact prejudiced the position of the accommodation collateral or of the appellant. Certainly The Railroad Credit Corporation, to retain its accommo-

dation collateral, was not required arbitrarily to object to, and refuse to consent to, a plan which the Commission, the District Court, and the Supreme Court of the United States have found to be reasonable and proper, or to urge fanciful last minute changes. Such conduct would be hostile to the whole spirit and purpose of §77. To the contrary, our duty was to collaborate in working out a plan which would give us as much as possible of the debtor's property so that to that extent, at least, the accommodation collateral might be exonerated. No such issue was raised below. If this is the basis of appellant's claim, as distinguished from a construction of the order of the Commission, it is a confession that the court below had no jurisdiction of the independent action. (See p. 51 below.) But the real answer is that if the debtor was released, the release was not by voluntary act of the parties, but was by operation of law. (See pp. 29-41 above.)

In support of the position that though The Railroad Credit Corporation was not made whole in fact, it was made whole in legal contemplation by the Plan, appellant urges that the Plan provided that the securities distributable to The Railroad Credit Corporation should be reduced to the extent of anything received from the Debtor's distributive share under the Marshaling and Distributing Plan, 1931, reducing the common stock at \$62 per share. It is believed that the construction of the Plan relied upon is incorrect. This question is before the Court on the appeal of The Railroad Credit Corporation in 10,962. (See the Opening Brief of The Railroad Credit Corporation on its appeal.) But whether we are correct or incorrect, the consideration suggested has no bearing.

In dealing with the Debtor's share under the Marshaling and Distributing Plan, 1931, the Plan was dealing with **property of the Debtor**. The problem there was one of allocation of new securities among creditors, having regard for the security held by each and to be surrendered by them. It was only a matter of fixing a proper relation between the creditors. The appropriateness of the determination depended only upon its relative correctness. Even if, by the distribution of new securities, the various creditors were not made whole, it might still remain that if a creditor had and retained property which was that of the Debtor the securities otherwise distributable to that creditor should be reduced. Proper adjustment must be made among all creditors to preserve their relative priorities among themselves, whether they are made whole, in fact or in law, or not. In such an adjustment, the manner in which the Debtor's property is dealt with (whether or not deduction of new securities to be issued is to be made because of debtor's property retained by a creditor), without more, has no tendency to show that a creditor has been made whole, in law or in fact, and has no bearing upon the status of accommodation collateral.

An argument is attempted to be bottomed on the proposition that the holders of first mortgage bonds were made whole. The suggestion presents neither head nor tail. It is suggested that the holders of Firsts must be made whole before any part of the Debtor's property can pass to the holders of junior securities. This wholly overlooks the facts that the so-called junior securities, general and re-funding bonds, were themselves a **first** lien on a substan-

tial part of the Debtor's property.⁴⁶ (See pp. 21 to 23 above.) Appellant's brief is not even clear as to whether it considers the Firsts were or were not made whole. At places it is stated that the Firsts were made whole⁴⁷ and then, in contradiction, it is said that they were not.⁴⁸ But the important consideration is that it is immaterial whether holders of Firsts were or were not made whole. If holders of first mortgage bonds were senior creditors or had a senior lien on the bulk of the Debtor's property, it might well be that they were made whole, and still junior creditors would not be made whole, in law or in fact. If

46. In Appellant's Brief, p. 22, it is said the first mortgage was a first lien on all the Debtor's properties valued for purposes of reorganization at \$97,863,562 except money and securities valued by the Commission at \$1,897,965 subject to a paramount lien under the refunding mortgage. The Commission made no finding of value on the Debtor's property. The very reason this court reversed the order of the District Court confirming the Plan was that no such findings were made and it was the opinion of this court that such findings should be made. What the Commission found was that the Debtor's property had a value (regard being had for the income) which would warrant the issuance of certain securities,—bonds, income bonds and preferred stock having par value and no par common stock. This is a very different thing from finding the value of a Debtor's property. The figure \$1,879,965 was not found as the value of the property subject to the first lien of the general mortgage bonds. It is a figure reached by adding together the principal amount of the income bonds and the par of the preferred stock allotted to the holders of general mortgage bonds.

It should be noticed that two of the figures in note 40 at p. 53 of the Opening Brief of The Railroad Credit Corporation on its appeal are incorrect. The figure \$1,221.89 should be \$1,217.89 and, by consequence, the figure \$27,313.61 should be \$27,309.61.

47. It is said that 89,253 shares were not required to make the Firsts whole and were therefore allotted to other security holders (Brief, p. 23), that "it is clear that the holders of first mortgage bonds are made whole by what was given them in new securities" (p. 30), and then, in immediate sequence, it said: "it must not be inferred, however, that the first mortgage bondholders are made whole when given the equivalent of 100% of the principal and interest upon their bonds." (p. 31) Again it is said that the Commission and the Court determined that the Firsts would be made whole, plus compensation for their surrender of seniority (p. 43).

48. At p. 31 it is said it is not to be inferred that the Firsts were made whole (see note 47) and at p. 37 it is said: " * * * but the making whole of the first mortgage bondholders was a mere legal fiction which may not be extended to a junior creditor so as to prevent the junior creditor from enriching himself further at the expense of an accommodation surety", whatever this may mean. If the making whole of the Firsts is a mere legal fiction and if this legal fiction is not to be extended to a junior creditor, it follows that not even by legal fiction was the junior creditor made whole.

junior creditors got only what was left after the Firsts were taken care of, what was left might well be wholly insufficient to satisfy their claims. This is the finding of the Commission. (See p. 19 et seq. above.) This was the basis of its allocation of new securities in proportion to the security held rather than in proportion to the amount of claims.

It is said that under the Plan, and as matter of law, The Railroad Credit Corporation was required to take new no-par common stock at \$62 per share; that since at this figure, the stock allotted to it, with other securities, computes out at substantially the amount of its claim, it must be considered that it was made whole. The legal presumption is directly to the contrary. The legal presumption is that where a **creditor** having a secured claim, carrying a fixed rate of interest, was required to take in exchange common stock, changing its creditor's position for a mere equity ownership, even if at a face equivalent, it was not made whole; that a creditor is not made whole when it is required to surrender a senior form of security for no more than the equivalent in principal amount of an inferior grade of security. (Cf. *Institutional Investors v. Chicago, M. St. P. & P.*, 318 U.S. 523, 569, 87 L.ed. 960, 1009.)

But the Plan does not indicate that \$62 was the value of the common stock to The Railroad Credit Corporation for any purpose other than a formal statement of the relative priorities of the various creditors. There is no mystery in the way in which the figure of \$62 was reached. In its first report the Commission assumed that the first mortgage bonds had an overall priority position. Accord-

ingly, the two classes of senior securities (other than bonds for new cash) were all assigned to the first mortgage bondholders. The holders of general and refunding mortgage bonds received only the junior securities, common stock. (See pp. 19, 20 above.) Upon reconsideration, it was found that the general and refunding mortgage bonds were a first lien on substantial property. Accordingly, some income bonds and preferred stock were allotted to the holders of the general mortgage bonds. This required an adjustment of the common stock. (See pp. 21 to 23 above.) In making the new allotment, allotment was made to The Railroad Credit Corporation and the James Company on precisely the same basis, i. e., the proportion of general and refunding mortgage bonds held by each. In the case of The Railroad Credit Corporation, when this allotment was compared with the total amount of its claim, an arbitrary factor of \$62 per share developed (Opening Brief of The Railroad Credit Corporation on its appeal, p. 52 et seq.). The same process would develop a figure of \$154 per share for the James Company. It is conceded that the James Company was not made whole, in law or in fact (Appellant's Brief, p. 42).

There is another interesting comparison. In its original report, the Interstate Commerce Commission allotted all of the senior securities, income bonds and preferred stock, to the senior creditors and in addition allotted to them 154,241 shares of the no-par common stock, leaving only 159,462 shares of no-par common stock allotted to the junior creditors who held general and refunding mortgage bonds. (See pp. 19, 20 above.) When the Commission filed its supplemental report, it concluded that the general and

refunding mortgage bonds were a first and senior lien on certain assets and, therefore, entitled, to some extent, to receive senior securities. It found that the general and refunding mortgage bonds held a first lien upon property of sufficient value to warrant the allocation to the holders of general and refunding mortgage bonds, ~~and of the first-lien~~ income bonds of the principal amount of \$732,010 and preferred stock of a par value of \$1,147,955. The total of this principal amount at par value is \$1,879,965. This amount of senior securities it allotted to the holders of general and refunding mortgage bonds on account of the first lien of said bonds. It then undertook to compensate by reducing the common to go to holders of Refundings and increase the common to the Firsts. It, therefore, allotted to the holders of the general and refunding mortgage bonds, not the 159,642 shares of no-par common originally allotted to them, but only 88,847 shares, and it allotted the other 70,615 shares of the no-par common stock, plus the additional common provided for, to the holders of the Firsts. A comparison of the 70,615 shares of no-par common taken from holders of the Refundings with the \$1,879,965 principal and par of senior securities given them would indicate that the no-par common had a value of \$26.6 plus per share.

What is the conclusion? Simply that there is no way to read the Plan of Reorganization, in the light of the full record, particularly the original report of the Commission, and to arrive at a conclusion that the Commission made any attempt to assign any value to the no-par common stock except for the purpose of stating an arbitrary factor which would do nothing more than reflect the relative gen-

eral and over-all priority position of the Firsts. (See Opening Brief of The Railroad Credit Corporation on its appeal, p. 52, et seq.)

Appellant agrees that the common stock cannot be taken at one value for one purpose and at another value for a different purpose all in the same plan (Appellant's Brief, p. 27). Yet this is what appellant attempts. In stating that the holders of the first mortgage bonds took the common at an assigned value of \$57, it is said that the holders of the Firsts were thereby made whole.⁴⁹ This assumes a value of \$57 per share. (See Appellant's Brief, pp. 30, 32.) Yet, almost in the same breath, it is said that \$62 is the real value (Appellant's Brief, pp. 31, 32). The brief blithely ignores what the assigned value would be in the case of the James Company and wholly overlooks the fact that a value of \$50 per share was assigned for purpose of conversion of bonds. (See Opening Brief of The Railroad Credit Corporation on its appeal, top of p. 54.)

49. It cannot be assumed that at the same time the real value of the common stock was \$62, either in fact or in law under the Plan. If such an assumption is made, the holders of Firsts were more than made whole.

The suggestion that the real value is \$62 and that the holders of Firsts were allowed a differential of \$5 to compensate them for giving up a senior position will not hold water. A comparison of the original plan with the final plan (see pp. 17 to 23 above) will disclose that under the final plan the holders of general mortgage bonds received some of the new income bonds and preferred stock, not because of any assumed differential of \$5 per share allowed on the common stock, but because, on reconsideration, it was found that the lien of the general and refunding bonds was a first lien on certain assets of the Debtor. Because of this it was necessary to make a new allocation and allot to the holders of general mortgage bonds some of the income bonds and preferred stock. This necessitated (for the purpose of maintaining the respective priorities of the parties, and recognition of the general overall priority of the Firsts) an allotment of some of the common to the Firsts. It happened that when this was done and the securities allotted were compared with the amounts of the various claims there was a differential of \$5 in the arbitrary values assigned to the common as between holders of Firsts and The Railroad Credit Corporation. But as to the James Company (which was in exactly the same position as The Railroad Credit Corporation, except that it did not hold as much security per dollar of claim) the differential was \$97.

But, even if, for purposes of the Plan, we took the common at \$62 per share, and this operated between us and the Debtor to release the Debtor, **this was only between us and the Debtor.** (See pp. 29-41 above.)

The action of the District Court cannot possibly disturb the Plan or affect the allocations made. Only The Railroad Credit Corporation and The Western Pacific Railroad Corporation are interested in or can be affected by the matters involved on the latter's appeals.

Conclusion as to the Merits.

Perhaps we have been guilty of unduly magnifying appellant's position. We believe that the whole matter can be stated very shortly. **Appellant does not contend that The Railroad Credit Corporation was made whole in fact.** Its only argument is that The Railroad Credit Corporation was made whole as matter of law. The only foundation claimed for this is the Plan itself. It is said that the Plan made The Railroad Credit Corporation whole and exonerated the accommodation collateral. **But this is precisely what the Supreme Court said the Plan did not do.** (See pp. 26 to 28 above.) The District Court was correct when it said that appellant, in attempting so to make use of the **Plan**, was attempting to attribute to the Plan the very thing which the Supreme Court said the Plan did not do.

IV.

**THE DISTRICT COURT PROPERLY ENTERTAINED THE
PETITION FOR CONSTRUCTION OF THE PLAN IN THE
REORGANIZATION PROCEEDING AND PROPERLY DIS-
MISSED APPELLANT'S INDEPENDENT ACTION.**

The necessary interrelation between the construction to be given the Plan of Reorganization and appellant's independent action, and the absolute dependence of that independent action upon a question of the meaning and effect of the Plan is sharply silhouetted by the complaint in the independent action. The complaint alleges that both plaintiff and defendant are Delaware Corporations (Par. I, III-R 2). There is no diversity of citizenship. Jurisdiction to entertain the action depended solely on the presence of a Federal question (U. S. Const., Art. III, §2). The pleader realized this. He attempted to state a Federal question. It is alleged that the action is one "arising under the Constitution and laws of the United States of America"; "that the cause of action herein asserted arises under and by reason of the orders and decrees of this Court and the Supreme Court of the United States approving the plan of reorganization of the Debtor * * * and necessarily involves an interpretation of said orders and decrees" (Pars. II, IX, III-R 2, 9). This is the only attempt to present a Federal question. The remaining allegations of the complaint demonstrate that this is the only Federal question which could be asserted. Without this question there was no jurisdiction. So the independent action **necessarily** depended and turned upon the question of, and the answer to be given as to, the meaning and effect of the Plan, the very matter presented in the reorganization proceeding itself.

This is true not only as matter of jurisdiction to entertain the independent action, but is true of the merits of the question presented. The only claim made in the independent action was that when properly construed the **Plan**, as matter of law, exonerated the accommodation collateral. If the question of the meaning of the Plan were determined adversely to the plaintiff, no other question remained. On the merits, then, plaintiff's right to the relief sought in the independent action depended upon the answer to the question presented by the petition to the Reorganization Committee.

It is not to be doubted that the District Court has jurisdiction to entertain the petition of the Reorganization Committee and to determine the meaning and effect of the Plan, even as to The Western Pacific Railroad Corporation.

The Western Pacific Railroad Corporation asserts that it is not a party to the Plan.⁵⁰ It seems to proceed upon the assumption that, because it receives nothing under the Plan, it is not a party to it. But it cannot be questioned that it was a party to the reorganization proceedings. (See p. 5 above.) And it is a party to the Plan even though it received no benefit under the Plan. The Plan expressly dealt with it. The Court had jurisdiction to deal with it. (See note 5, p. 5 above.) It did not lose jurisdiction simply because the Plan afforded The Western Pacific Railroad Corporation no affirmative relief.

Nor can it be doubted that the District Court had jurisdiction, prior to the distribution of the new securities

50. This presents another of the many inconsistencies of appellant's brief. If appellant is not a party to the Plan, upon what legal theory can it claim that any provision of the Plan is binding in fixing its relations with The Railroad Credit Corporation?

under the Plan, prior to the return of its property to the Debtor, and prior to the general consummation of the Plan and discharge of the Trustee, to make such orders as might be necessary to carry out the Plan, construing the Plan where necessary. It had the broad powers of a court of equity (*Continental Illinois Nat. Bk. v. Chicago, R. I. & P. Ry. Co.*, 294 U.S. 648, 675, 79 L.ed. 1110, 1127. Cf. *In re Utilities etc. Corp.*, 90 F.2d 798 (C.C.A. 7)) to do what was necessary to fully dispose of the matters before it and administer upon the estate of the Debtor. This is precisely what is contemplated by Section 77(f). (Cf. *National Lock Co. v. Hogland*, 101 F.2d 576, 583 et seq. (C.C.A. 7); *In re 4145 Broadway Hotel Co.*, 131 F.2d 120 (C.C.A. 7—cert. den. 318 U.S. 776, 87 L.ed. 1137); *Clinton Trust Co. v. John H. Elliott Leather Co.*, 132 F.2d 299 (C.C.A. 2); *Shores v. Hendy Realization Co.*, 133 F.2d 738 (C.C.A. 9).) In particular, that section provides that on confirmation of the plan the Debtor or any other corporation organized for the purpose shall have power to carry out the plan and put it into effect,—“shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and control of the judge.” Under §1(20) “‘Judge’ shall mean a judge of a court of bankruptcy” (not an arbitrator). The probability that further action of the court after confirmation of the plan would be needed to carry the plan into execution was too obvious to escape the attention of Congress.

No express reservation of jurisdiction by the court was necessary. But even if it were, we have it. It is Paragraph V of the Plan, which the Court made its own, when it

adopted the Commission's findings and Plan and confirmed the Plan. This was one purpose of Paragraph V. The other purpose was to remove any doubt as to whether, in construing the Plan, or making additional and necessary supplemental orders, there was a requirement of resubmission to the Commission. If the Plan in the first instance required the approval of the Commission, someone might argue that any order construing it, or supplementing it, or providing for some necessary step in carrying it into execution, required the approval of the Commission. Paragraph V anticipated such a possibility and removed doubt.

If we are correct as to the jurisdiction of the District Court, and if it properly entertained the petition of the Reorganization Committee for construction of the Plan, passed on that petition, and construed the Plan, there was nothing left to be determined in the independent action and the independent action was properly dismissed. It can make little difference whether this dismissal is put upon the ground that the matter was necessarily involved in the reorganization proceedings and, properly, should be determined there, or upon the ground that the only matter of substance having been determined, the defendant in the independent action was entitled to summary judgment.

But if we are wrong that determination of the question in the reorganization proceeding necessarily disposed of the independent action, and if the issue tendered by the independent action was one to be determined only in that action, it still remains that the action of the trial court in dismissing the independent action was correct. The motion to dismiss the independent action was not submitted solely upon the complaint and the motion to dismiss. **Upon the**

motion the Court had before it the full record. (See pp. 6 to 10 above.) Upon the full showing made and submitted to the Court plaintiff was not entitled to the relief sought. The only question tendered was the meaning and effect of the Plan. In view of the full record, the Plan could have but one meaning,—it did not exonerate accommodation collateral. There was nothing else in the independent action and it was properly dismissed on the merits disclosed by the showing *de hors* the complaint.

V.

Did not
**THE JUDGE OF THE DISTRICT COURT¹¹ ACTED AS AN
 ARBITRATOR AND THIS COURT HAS ~~NO~~ JURISDICTION OF THE APPEAL.**

It is suggested that this Court has no jurisdiction of an appeal from the order in the reorganization proceeding. If so, appellant's appeal should be dismissed. The point is implicit in the assertion made that the court below was acting only as an arbitrator in the reorganization proceeding when it construed the plan of reorganization. The suggestion is made without supporting reference to the record or to authority. No such supporting reference can be found. The court below was not acting as an abritrator. It was acting as a court of bankruptcy under Section 77(f). To say more would be to repeat what has just been said. (See pp. 51 to 54 above.)

CONCLUSION

The District Court performing the functions contemplated by Bankruptcy Act §77(f), for the purpose of carrying out the confirmed plan of reorganization, and supervising the action of the parties in carrying it out, when called upon to do so in the reorganization proceedings, properly entertained a proceeding for construction of the Plan. Its responsive order, insofar as The Western Pacific Railroad Corporation questions it, was correct. It properly held that the Plan did not operate to exonerate the accommodation collateral held by The Railroad Credit Corporation. This necessarily disposed of appellant's independent action. But, if not, it still remains that the judgment in that action should be affirmed. The motion was not determined solely upon the face of the complaint and the motion. The court had before it the full record and all the facts. Its judgment is correct. Appellant asks a determination of the real merits. It got such a determination. It is in no position to complain.

It is respectfully submitted that so much of the order in the reorganization proceedings as is drawn in question on the appeal of The Western Pacific Railroad Corporation in No. 10,962 should be affirmed and that the judgment appealed from in No. 10,966 should be affirmed.

Dated at San Francisco, May 17, 1945.

ARTHUR B. DUNNE,
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Credit Corporation.*

EDWARD G. BUCKLAND,
WILLIAM J. KANE,
Of Counsel.

No. 10,962

United States
Circuit Court of Appeals
For the Ninth Circuit

THE RAILROAD CREDIT CORPORATION,
a corporation,

Appellant,

vs.

FREDERICK H. ECKER, FRANK C. WRIGHT and ROBERT E. COULSON, the members of the Reorganization Committee of The Western Pacific Railroad Company, Debtor,

Appellees,

and

THE WESTERN PACIFIC RAILROAD CORPORATION,
a corporation,

Appellant,

vs.

THE RAILROAD CREDIT CORPORATION,
a corporation,

Appellee.

Closing Brief of The Railroad Credit Corporation
As Appellant Upon Its Appeal

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Appellee.

Closing Brief of The Railroad Credit Corporation
As Appellant Upon Its Appeal

We shall have occasion to refer to our Opening Brief on this appeal and will do so as "Op. Br." We shall also have occasion to refer to the "Reply Brief of The Railroad Credit Corporation as Appellee on the Appeals of The Western Pacific Railroad Corporation" in Nos. 10,962 and 10,966, and will do so as "Rep. Br." For this reason, a copy of our Reply Brief was served on the Reorganization Committee, although it professes

not to be interested in the appeals of The Western Pacific Railroad Corporation. The brief on behalf of the members of the Reorganization Committee as appellees on appeal of The Railroad Credit Corporation we will refer to as "Com. Br." Record references will be made as in our Opening Brief and Reply Brief. All emphasis by boldface type is ours.

We note the following corrections to be made in our Opening Brief:

Insert "or" before "on" in the first line of the matter indexed in the subject index for page 20.

Page 4, third line up from the bottom of the text, substitute "205" for "77" in the references to the sections in 11 U.S.C.A.

Page 20, second line from the top, strike out the word "was."

Page 24, citation to the second quotation, after "498" strike out "4 col."

Page 47, eighth line from the bottom, substitute "word" for "work."

Page 53, note 40, substitute "\$1,217.89" for "\$1,221.89" and "\$27,309.61" for "\$27,313.61" (see Rep. Br. p. 45, n. 46, par. 2).

I. THE FACTS

The attempt of the brief for the Reorganization Committee to deal with the facts calls for little comment. The efforts consist principally of reprinting matter which we have set out. Nothing new is added. No corrections or criticisms are suggested. The attempt is most significant for its admissions and omissions.

It is said that by December 1944, the Debtor's distributive share under the Marshaling and Distributing Plan, 1931, had increased to \$27,094 (Com. Br. 2). This, of course, does not appear in the record. It may be true, but no concession is now made, because (1) counsel presenting this brief is not informed

of the fact,* and (2) if we are correct in our position on this appeal, it is not material.

It is said that the Plan of Reorganization was submitted to the creditors and acted upon by them favorably. This does not appear in the record. We make no point of that. It is the fact that The Railroad Credit Corporation joined in the favoring action in the way contemplated by §77 of the Bankruptcy Act.

It is noticed that in the Commission's original report it was provided that The Railroad Credit Corporation should release and surrender the Debtor's distributive share under the Marshaling and Distributing Plan, 1931, that The Railroad Credit Corporation objected to this provision, and, in response to its objection, the Commission modified its original report and substituted the provisions of the final Plan (Com. Br. 9, 10, and see Op. Br. 43-48). And then, "for reasons which are not at all clear" because, as the Reorganization Committee's brief points out, "the fairness of the plan" and whether it responds to applicable rules of law "are no longer open to question" (Com. Br. 7),—the conclusions of the Commission are now "*res judicata* and not open to question upon this appeal" (Com. Br.),—it is said that this change made by the Commission, in response to the objection of The Railroad Credit Corporation, was made "for reasons which are not at all clear" (Com. Br. 10). With deference, the reasons **are** clear. Facts which are not, and cannot, be disputed (Op. Br. 43-48; Com. Br. 9, 10) make it apparent that the change was made to bring the Plan into harmony with the full priority rule of the *Boyd Case* (Op. Br. 36-41), because, as to the Debtor's distributive share, The Railroad Credit Corporation was in the position of having a complete set-off,—we believe this is the proper analysis (Op. Br. 14—note 13, 16—note 15, 35, 36),—or a first lien.

It is worth digressing to point out again (see Op. Br. 42-48) that to give the Plan the construction the Committee now tries to support, is to ignore both the change in the Plan, made by

*After this brief was set up in type we were informed that another distribution was made on October 20, 1944, increasing the Debtor's distributive shares by \$1,003.53 and to \$27,095.25.

the Commission after mature reflection, and the reason for the change,—to treat the Plan just as though no objection or responsive change had been made. The Committee's Brief attempts to bypass this with shrewd silence. This is one of the brief's significant omissions.

It is suggested that the Plan, by permitting The Railroad Credit Corporation to participate and not "release or surrender any right or interest in the distributive shares of the Debtor or its subsidiary under the Marshaling and Distributive Plan, 1931" (Subd. R, Op. Br. 28), accorded to The Railroad Credit Corporation "a privilege not extended to any other secured creditor of the debtor" and that "no other secured creditor was permitted, under the terms of the plan, to retain any collateral pledged by the debtor" (Com. Br. 11). What was accorded to The Railroad Credit Corporation was no more than a proper recognition of its legal rights and it was given no treatment more favorable than that given to others similarly situated. The Marshaling and Distributing Plan, 1931, expressly provided "that any distributable amount inuring to a carrier indebted to the fund, instead of being paid to it, **shall be credited on its obligation**" (Op. Br. 14). Notice: "**shall be credited,**" not "may be credited." The Debtor's notes authorized the payee to "appropriate and apply to the payment" of any debt due, whether existing or later contracted, "any and all property now or hereafter in the hands of the payee belonging to the Railroad Company" (Op. Br. 15, 16). What we had was not merely as good as cash (compare the position of the R.F.C. in *In re Chic. & N. W. Ry. Co.*, Op. Br. 37) it **was** cash. We had a prior, paramount and absolute right to utilize fully the Debtor's distributive share, in the very form in which it existed, by applying it directly against the debt. No other creditor was so situated. But there were creditors who had analogous positions and who were all given analogous treatment, adjusted to their positions. The treatment accorded to us may have been different in degree, but it was not different in kind from the full priority treatment accorded to the holders of equipment trust certificates, the Bald-

win lease and the Pullman contract (Op. Br. 37, 38). There is nothing here but a proper application of the full priority rule of the *Boyd Case*.

It is said that we were permitted to retain the Debtor's distributive share notwithstanding the injunction of August 2, 1935 (Com. Br. 11) and that we even assert "the special privilege of realizing on debtor's collateral in defiance of the District Court's restraining order of August 2, 1935" (Com. Br. 13). The suggestions hardly call for comment. The order did not restrain us from retaining the Debtor's distributive share. We are not seeking to sell, dispose or convert it. The restraining order did not apply to set-offs. Indeed, \$150,829.12 has been applied in set-off and reduction of the Credit Corporation claim (59 separate distributions) without criticism or comment. (See Rep. Br. p. 4, note 2; Op. Br. pp. 7, 14, 16.) But the short of the whole matter is that if there is anything in the restraining order in conflict with any provision of the Plan, the restraining order was necessarily, to that extent, vacated by the order of the court confirming the Plan.

It is said that we even assert that we are "entitled to be treated as a senior creditor with full priority rights" although under the Plan we were treated as a junior creditor (Com. Br. 13). In a sense,—only a general and inaccurate sense,—we were a junior creditor when our total and over-all position was looked to. More properly, we were a junior creditor as to most of the Debtor's assets; but we were a senior creditor as to some,—the general and refunding mortgage bonds had a first and senior lien on certain of the Debtor's assets and The Railroad Credit Corporation, if the provisions of the Marshaling and Distributing Plan, 1931, and the Debtor's notes be considered as creating a pledge, had a first lien on, and was a senior creditor in respect of, the Debtor's distributive share.

At a number of places, the Committee's Brief undertakes to state what the Commission did **not** find. In so far as it is necessary to comment on such statements, it is done below. Here it is enough to say that we are relying upon what the Commis-

sion **did** find and **did** order, not upon its failure to find. Here it is enough to notice that, while the statements are literally true that the Commission did not make the findings suggested, the statements cannot be read with further implications. In those instances referred to in which the Commission did not make a finding, as suggested, **it made no finding at all**,—it did **not** find that the converse was true. The instances selected are instances of silence and no more.

II. THE ISSUE

The Committee's Brief states (p. 6) that on this appeal there is only one issue,—“the question of construction of certain provisions of the plan of reorganization.” With this we agree. But with the further veiled suggestions, that in construing the Plan the setting in which it is found is to be disregarded, we do not agree. We deal with this below.

It is further said that the issues presented on the appeals of The Western Pacific Railroad Corporation do not involve any construction of the Plan (Com. Br. 6). This well may be so. But, if true, it means that the appeals of The Western Pacific Railroad Corporation present nothing, for, without such an issue, The Western Pacific Railroad Corporation was not before the court (Rep. Br. 51, 52). It is understandable why the Committee's Brief takes this position. It takes this position, because, to maintain its own, it finally has been forced to join hands with The Western Pacific Railroad Corporation and to claim,—carefully, it is true, guardedly,—that, although The Railroad Credit Corporation was not made whole in fact (The Western Pacific Railroad Corporation concedes this, the Reorganization Committee does not deny it), upon a construction of the Plan and in legal intendment,—by a fiction,—The Railroad Credit Corporation has been made whole. “Refunded” is the cautious and ambiguous word the Reorganization Committee uses. The only anamorphoscope needed is the Plan itself,—the whole Plan, not selected and dissected excerpts.

III. CONSIDERATION OF APPELLEE'S POINTS

The Committee's Brief notices that our Opening Brief set out somewhat fully the background of the Plan and its pertinent provisions. In this connection, and as part of the background against which the Plan stands, the full priority rule of the *Boyd Case* was stated. The Committee's Brief, with hardly a polite nod, turns its back on this with the comment that the Plan is now *res judicata* and its fairness is no longer open to question. The attempt is to create the impression that we are attacking the Plan.

There is no attack upon the validity of the Plan. Its validity is foreclosed. **But its meaning and construction are not.** To bring forward the considerations which bear upon the proper construction of the Plan is no attack upon it. "The mere construction of a decree involves no challenge of its validity" (*St. Louis etc. R. Co. v. Wabash R. Co.*, 217 U.S. 247, 250, 251, 54 L.ed. 752, 755, col. 1).

There is nothing peculiar to the construction of a decree. Ordinary rules of construction apply. It is to be construed just as "a contract or any other document" is to be construed (*Lazar v. Superior Court*, 16 C.2d 617, 622, 107 P.2d 249; *Permain Oil Co. v. Smith*, 129 Tex. 413, 107 S.W.2d 564, 567).¹ Two of the general rules of construction are of significance here.

In the construction of a decree, its language is limited to the matter then under consideration (*Vicksburg v. Henson*, 231 U.S. 259, 269, 58 L.ed. 209, 216).² (Cf. Rep. Br. 26)

The document is to be given a reasonable construction. This contemplates a construction which will not bring it into collision with established rules of law (*Robbins v. Pac. Eastern Corp.*, 8 C.2d 241, 272, 65 P.2d 42; *Restatement, Contracts*, §236(a)).

1. Accord: *Gough v. Jones*, 212 S.W. 943 (Tex. Com'n of Appeals); *Texas Co. v. Beall*, 3 S.W.2d 524 (Tex. Civ. App.); *Prince v. Frost-Johnson L. Co.*, 250 S.W. 785, 790 (Tex. Civ. App.).

2. At U.S. 273, L.ed. 218, the court also points out the settled rule that in the construction of a decree you cannot seize upon isolated and dissected parts, but that you must look to the whole and at what the whole was designed to accomplish.

"The settled doctrine in the construction of a statute is to give it, if possible, a rendering which will make it valid rather than invalid. This is true also as to construction of an agreement. **The same salutary rule will be applied by this court when confronted with a judgment.** The court below is presumed to have decided correctly, until the contrary is shown."³ (*Byrd v. Goodman*, 195 Ga. 621, 25 S.E. 2d 34, 40, col. 2)

The most familiar statement of the rule, as it applies to judgments, is that in 1 *Black on Judgments*, §§3, 123, where, speaking of a judgment, it is said:

"When it admits of two constructions, that one will be adopted which is consonant with the judgment that should have been rendered on the facts and law of the case."

This language from *Black* is taken from its quotation in *Watson v. Lawson*, 166 Cal. 235, 241, 135 P. 961,⁴ and the court itself says (we omit supporting citations):

"In applying a judgment, 'if the language be in any degree uncertain, we may properly refer to the circumstances surrounding the making of the order or judgment—to the condition of the cause in which it was entered.' A judgment 'must be construed with reference to the law regulating the rights of the parties.'"⁴

In *Manning v. Bank of Calif.*, 216 Cal. 629, 637, 15 P.2d 746, the court used language which has been used repeatedly, when it said that a suggestion made by counsel

"is in accord with the rule as to judgments generally, that where a judgment admits of two constructions, that one will be adopted which is consonant with the judgment that should have been rendered on the facts and law."

"Where a judgment is susceptible of two interpretations, it is the duty of the court to adopt the one which renders

3. Supporting citations have been omitted.

4. The *Watson Case* is quoted in *Prescott v. O'Connell*, 27 C.A.2d 220, 223, 80 P.2d 749; *Treece v. Treece*, 125 C.A. 726, 14 P.2d 95 (hr. den.); *Anderson v. State*, 54 Ariz. 387, 96 P.2d 281, and was followed in *Manning v. Bank of Calif.*, 216 Cal. 629, 637, 15 P.2d 746, and *In re Ferrigno*, 22 C.A.2d 472, 71 P.2d 329.

it more reasonable, effective and conclusive in the light of the fact and the law of the case. A court's judgment must be read and interpreted in the light of what was before it, * * * (Pen-Ken Gas & Oil Corp. v. Warfield Natural Gas Co., 137 F.2d 871, 885, bot. col. 1 (C.C.A. 6,—cert. den. 320 U.S. 800, 88 L.ed. 483, reh. den. 321 U.S. 803, 88 L.ed. 1089)).

The rule is too well settled to warrant further discussion. If further authorities are desired they are available.⁵

This is the reason for consideration of the full priority rule of the *Boyd Case* (Op. Br. 38-42). We do not attack the Plan or the order confirming it. But when the Reorganization Committee raises a question as to its meaning, if it is susceptible of a construction as urged by the Committee, different from that which is apparent on its face and different from that urged in our Opening Brief, then in determining what construction shall be given to it and the order confirming it, the background of the Plan must be looked to, the whole Plan itself must be looked to, the Plan must be harmonized with its background and the purpose it was intended to serve, it must be harmonized and made consistent with itself, and it must be given a construction which makes it consistent with the full priority rule of the *Boyd Case*.

The Committee's Brief (p. 12) states that "the provisions of paragraph 4 of subdivision P of the plan * * * require a reduction in the **claim** of the Railroad Credit Corporation by the amount of proceeds of such distributive share," quotes provisions

5. *Byrd v. Goodman*, 195 Ga. 621, 25 S.E.2d 34, 40; *Chappell v. Small*, 194 Ga. 143, 20 S.E.2d 916, 920; *In re Summers*, 79 Ind. App. 108, 137 N.E. 291, 293 (applying the rule to an award under the workman's compensation act, noticing that while it was not a judgment, the same rule applied); *Louisiana etc. Co. v. Nuroff*, 139 La. 808, 72 So. 284, 288; *Sharp v. Zeller*, 114 La. 549, 38 So. 449; *Parten v. First Nat'l Bk.*, 204 Minn. 200, 283 N.W. 408, 412; *Simons v. Munch*, 127 Minn. 266, 149 N.W. 204; *Sharp v. McColm*, 79 Kans. 772, 101 P. 659, 662; *Stalick v. Wilson*, 21 N.M. 320, 154 P. 708, 709; *Wood v. Ross*, 85 S.C. 309, 67 S.E. 449, 452, bot. col. 2; *Gough v. Jones*, 212 S.W. 943, 944, bot. col. 2 (Tex. Com'n of Appeals); *Texas Co. v. Beall*, 3 S.W.2d 524 (Tex. Civ. App.); *Keton v. Clark*, 67 S.W.2d 437, 439 (Tex. Civ. App.); *Gans etc. Co. v. Stanford*, 91 Mont. 512, 8 P.2d 808, 811, col. 2; *Farmers etc. v. County Court*, 105 W.Va. 567, 143 S.E. 347.

of subdivision R of the Plan and says that "the extracts from the Commission's reports clearly provide for a reduction in the Credit Corporation's **claim** by the amount of such proceeds." This is accurate. We never argued that we were not required to reduce our "claim"; we never suggested we were entitled to double payment. But all that was required by the Plan was reduction of our "claim."

The Committee's Brief (p. 12) states that the Credit Corporation's claim was dealt with as a unit. How else could it have been dealt with? But the Credit Corporation's **security** was **not** dealt with as a unit. The Plan, in the light of the decision of the Supreme Court, makes it clear that sharp distinction was made between (1) the general and refunding mortgage bonds, (2) the Debtor's distributive share under the Marshaling and Distributing Plan, 1931, and (3) the accommodation collateral. Later (p. 15) it is said that the new securities allotted to us could not have been allotted "in payment of part only" of our claim. This is just playing with words. The securities here were not allotted in payment of part of the claim, but they were allotted as only part payment of the whole claim. The new securities were allotted "**in respect of**" our claim, the allocation being made upon the basis of security in the form of general and refunding mortgage bonds held. The new securities were **not** issued "**in payment of**" our claim.

It is said (p. 12) that there was "no finding that the Credit Corporation's claim was not fully secured by the Debtor's collateral held by it." We may add that there was no finding that it **was** fully secured. If the Committee's Brief, by this statement, means there was no finding in so many words the statement is accurate. But if it means that there was no finding of the **fact** that demonstrated that the Credit Corporation's claim was not fully secured by the Debtor's collateral, the statement is inaccurate. The fact was found as we showed in our Opening Brief (pp. 17, 18). Indeed, the Committee's Brief (p. 15) grudgingly concedes this, throwing out the suggestion that the finding "may

have been factually erroneous." But as the brief itself states (p. 15) "whether or not factually erroneous, the conclusion of the Commission * * * is now *res adjudicata* and not open to question on this appeal."

What has just been said disposes of the suggestion at page 14 of the Committee's Brief that there was no finding of the value of the general and refunding mortgage bonds. There was no finding in terms as to the value, but there was the finding of a fact, from which it necessarily follows that the value of those bonds could not exceed 359.3367 per 1,000 of principal and interest (Op. Br. 17).

It is suggested that in subdivision P(4), an allocation of common stock was made to the Credit Corporation at \$62 per share and that this is the value of that stock for the purposes of the Plan. This has been fully dealt with in our Opening Brief and Reply Brief. In this connection one new suggestion is made. It is said that the Supreme Court spelled out a determination of total value of the Debtor's system from the "total and **assumed** value of the security authorized by the Plan" of \$84,000,000; that deducting from this trustees' certificates, equipment obligations and first mortgage bonds, principal and interest \$75,000,000 plus, the remainder of \$9,000,000 would approximate the value of the assets subject to the lien of the general and refunding mortgage bonds and such assets as were not subject to any lien (Com. Br. 14, 15). The impropriety of proceeding on this line of reasoning is obvious. But, assuming that it is not, what is the result? There was outstanding \$18,999,500 principal amount of general and refunding mortgage bonds. On this line of reasoning those bonds would be worth less than 500 per 1,000 of principal of bonds and the value of the security which the Credit Corporation held (the only thing against which new securities were allotted) for its claim of \$2,590,924.11 would be less than \$2,000,000. This without more demonstrates that the claim of the Credit Corporation was unsecured to the extent of over \$590,924.11.

The Committee's Brief says that the Firsts were paid in full and that the junior security holders were entitled to receive nothing until the Firsts were fully paid. Assuming that the Firsts were paid in full,—it is not the fact (see particularly Rep. Br. 46),—this would have no tendency to show that the junior security holders were or were not paid in full. And it is not true that the "junior" security holders were entitled to nothing until the Firsts were paid in full. The junior security holders were junior only as to certain assets. **As to other assets, they had a first lien.** It is unnecessary to repeat the material in our Reply Brief at pages 17-23.

At one or two places, the Committee's Brief says that the Credit Corporation's claim was fully secured and fully paid. At other places it is more cautious and says that "the plan provided for **refunding** in full the claim of the Credit Corporation by issue to it" of new securities. Our Reply Brief sufficiently deals with any claim that we were "made whole",—were paid in full. If, by saying that our claim was "refunded," it is meant that we were made whole in fact, the statement is subject to all of the defects of the claim of The Western Pacific Railroad Corporation. If by "refunded" is meant only that all of the Debtor's securities we held were called in and new securities of the Debtor substituted, and that by force of the statute, as between the Credit Corporation and the Debtor, the receipt of these new securities provided the Debtor with a personal defense to any claim against the Debtor by the Credit Corporation (see Rep. Br. p. 29, et seq.) the statement is accurate but meaningless. It advances us nowhere. It has no tendency to demonstrate that under subdivisions P and R of the Plan, beyond reduction of our "claim" by the amount of the Debtor's distributive share under the Marshaling and Distributing Plan, 1931, there was worked a reduction in the amount of the new securities issuable to us under the Plan.

It is said (p. 18) that the new securities issuable to the Credit Corporation could not possibly have been allocated "in payment

of only \$1,437,346 of the Credit Corporation's claim"; that this would result in issuing the common stock to the Credit Corporation at \$29.40 per share. But the stock was not issued in payment of the claims or part of any claim. It was allocated "in respect of" the total amount of the claims secured by general and refunding mortgage bonds, the allocation of the new securities being made among the creditors upon the basis, not of their claims, but of the security held by them. The Commission found, as a fact, that the general and refunding mortgage bonds could not have a value which would make those held by the Railroad Credit Corporation of a value of more than \$1,437,346. If the Committee's Brief would state the facts, and not make assumptions contradicted by the Plan, it would not become involved in the circles of its own reasoning.

Finally, with becoming apathy, it is said that the court's construction of the Plan, complained of on this appeal, is not open to review by this Court (p. 20). The Reorganization Committee does not go as far as the Western Pacific Railroad Corporation. It does not argue that the District Court acted only as an arbitrator. The point attempted is that The Railroad Credit Corporation, by favorable action on the Plan, as contemplated by §77 of the Bankruptcy Act, "in effect stipulated that no appeal would be taken from the District Court's construction order." The Committee's suggestion is to be approached with some settled rules in mind.

Waiver of a right of appeal is not readily to be implied (*Embry v. Palmer*, 107 U.S. 3, 8, 27 L.ed. 346, 348, quoted in *Gilfillan v. McKee*, 159 U.S. 303, 40 L.ed. 161; *Kane v. Roxy Theatres Corp.*, 63 F.2d 754 (C.C.A. 2,—cert. den. 289 U.S. 751, 77 L.ed. 1496); *Haschenberger v. Dennis*, 118 Neb. 411, 225 N.W. 25, 63 A.L.R. 493). "The right of appeal is always favored. It may be waived by contract, but such contract must be in writing, based upon a sufficient consideration, and filed in the case." (*Wishek v. Hammond*, 10 N.D. 72, 84 N.W. 587, 588) "The right of appeal is favored in law, and it will not

be held to have been waived except upon clear and decisive grounds." (*Hixon v. Oneida County*, 82 Wis. 515, 52 N.W. 445, 449; *Moore v. Moore*, 81 Ind.App. 169, 135 N.E. 362, 364. See also *Holmes v. District Co.*, 58 Nev. 352, 80 P.2d 907, 117 A.L.R. 1382⁶) This Court has taken occasion to say that "the evidence of a waiver of a right to appeal must be clear and decisive." (*Woodward v. McConnoughey*, 106 F. 758 (C.C.A. 9)⁷)

The Committee's Brief (p. 20) states, as we stated (Rep. Br. 53, 54), that it was anticipated that controversies might arise as to the proper construction of the Plan; that, for this reason, subdivision V was inserted in the Plan; that the purpose of subdivision V was to permit "the District Court to make a final and conclusive construction of any questioned provision of the Plan, **to the extent that the Commission itself might have made a final and conclusive determination as to the proper construction.**" If this means what it says, we would agree to it. Once the Plan had been confirmed by the court, the court's order had become final, and the Plan had been submitted to and approved by the creditors entitled to vote on it, it was no longer open to change or modification. Any question of its meaning,—of its proper construction,—would be beyond the power of the Commission. Any such question would present only a question of law resolvable by a court. As to these questions, the Commission itself could not make a final and conclusive determination. The Commission cannot make any conclusive determinations as to questions of law.⁸

6. The court says that "appeals as a rule are favored and not to be defeated by strained construction."

7. Upon the general proposition the following cases may also be consulted: *Ball v. Wright*, 115 Ga. 729, 42 S.E. 32; *Brown v. Galesburg etc. Co.*, 132 Ill. 648, 24 N.E. 522; *In re Abel*, 147 Wis. 467, 133 N.W. 585.

8. The Commission recognized the limits of its jurisdiction in the very matter of the reorganization of The Western Pacific Railroad Company (see I-R 262). And cf. *Brown & Sons L. Co. v. Louisville & N. R. Co.*, 299 U.S. 393, 81 L.ed. 301 (the construction of a railroad tariff is a matter of law like the construction of any other document and construction by the Commission is not conclusive where no administrative question is involved); *Institutional Investors v. Chic. etc. P. Co.*, 318 U.S. 523, 569, 87 L.ed. 959, 1009; *I. C. C. v. Ry. Executives Ass'n*, 315 U.S. 373, 86 L.ed. 904; *Powell v. U. S.*, 300 U.S. 276, 81 L.ed. 643; *I. C. C. v. Louisville & N. R. Co.*, 227 U.S. 88, 57 L.ed. 431.

Subdivision V is the **Commission** speaking—these words are out of the Commission's mouth, not out of the mouths of the creditors. By subdivision V the Commission was doing no more than removing a possible question of the necessity of reference of minor matters back to it. So far as the court was acting under subdivision (f) of §77,—was making orders relative to putting into effect and carrying out the Plan,—and was performing a function in respect of which the Commission had no power or authority, the Commission was not attempting to speak. With such matters the Commission had nothing to do,—it had no occasion to concern itself. Its language must be read in the light of the condition of the case at the time that language was used and the Commission's words are to be restricted to the occasion and object of their use. Prior to the final confirmation of the Plan and favorable action by the Creditors, there was occasion for the Commission to make clear that reference back to it of minor matters and matters of construction was unnecessary. Under subdivision (e) of §77, after the plan has been certified by the Commission to the court, the court is to act upon it and "if the judge shall not approve the plan" he may dismiss the proceedings or, in his discretion, "refer the proceedings back to the Commission for further action." The Commission had in mind that this should not be necessary if there were incidental or subsidiary parts of the Plan which did not meet the approval of the judge, or if the judge should find that he could not approve it without a definite construction being placed upon certain of the provisions. To avoid disapproval on account of minor matters and to obviate reference back to the Commission on that account, subdivision V was put in the Plan. Again, it is provided in subdivision (e) of §77 that after approval of the plan it shall be submitted to the creditors and if not accepted by them "the judge may nevertheless confirm the plan if he is satisfied and finds, after a hearing, that it makes adequate provision for fair and equitable treatment for interests or claims of those rejecting it." But, if it does not, the judge need not con-

firm the plan and "if the judge shall not confirm the plan he shall * * * refer the case back to the Commission for further proceedings." Again, on submission of the plan to the creditors, some creditor might reject it upon a well-founded but minor ground, which the court could readily correct by giving to the plan an appropriate construction. The purpose of subdivision V was to permit this and to avoid unnecessary failure of confirmation and reference back to the Commission.

This is the sense and proper limitation of subdivision V; and it would not violate the purpose and object of the provision to go a step farther and say that it was also designed to remove any claim of the necessity of reference back to the Commission when the court was making orders and supervising execution of the Plan as contemplated by subdivision (f) of §77. But to go beyond this is to distort subdivision V and attempt to make it serve a purpose never intended.

If there is any question as to the meaning and construction of a judgment or decree, it is to be given that construction "which is consonant with the judgment that should have been rendered on the facts and law of the case" (p. 8 above). It is settled that the court rendering a judgment cannot by that judgment deprive a party to the proceeding before it of the right of appeal from that judgment; that any such provision of a judgment is void on its face (*U. S. v. Adams*, 6 Wall. 101, 18 L.ed. 796; *Bell v. U. S.*, 9 F.2d 820 (C.C.A. 9); *Huff v. Huff*, 73 W.Va. 330, 80 S.E. 846, 848, col. 2, 51 L.R.A.N.S. 282; *Bartlet v. Slater*, 211 Mass. 334, 97 N.E. 991. Cf. *Jacksonville etc. Corp. v. Dunlap Hotel Co.*, 350 Ill. 451, 183 N.E. 397). If possible, a court's judgment would be given a construction which would make it consonant with this rule and which would not impute to the court an intention to violate it. For all the more reason, when the Commission speaks, it is not to be assumed that its language is directed at forcing a party to a reorganization proceeding to forego a right which does not appertain to any action

of the Commission, but is a statutory right appended to action of the bankruptcy court.

The cases cited in the Committee's Brief do not support the point attempted. *U. S. Consolidated Seeded Raisin Co. v. Chadock & Co.*, 173 F. 577, held simply that a stipulation waiving right of appeal from a specific and contemplated determination of an issue then framed was valid. The stipulation was one made and filed in the very proceeding in which the question was raised, after the matter had been argued and submitted, and expressly waived the right of appeal from the judgment to be rendered on the known issue so submitted. *In re Patterson MacDonald Shipbuilding Co.*, 292 F. 700, held that a consent to refer to a master did not preclude the right of appeal where it provided he should act in the same manner as a referee in bankruptcy. *Hoste v. Dalton*, 137 Mich. 522, ^{160 N.}800 T.W. 750, held that the right of appeal was waived in these circumstances: An agreement made in settlement of a dispute provided that a question of value should be submitted to arbitration. A question was raised, but the contract provided that any controversy under the agreement should be submitted to the court and that its decision should be final. The agreement was entitled in the court and cause. It was held that the agreement was valid.

None of these cases hold that any such provision as that in the Plan, made in the circumstances in which subdivision V was inserted in the Plan, constituted a waiver of a right of appeal from determination of then unknown and unanticipated controversies, by the court acting not merely to confirm action of the Commission, but acting independently and as a court of bankruptcy in the exercise of powers conferred upon it by subdivision (f) of §77 and to be exercised by it without regard for or reference to the Interstate Commerce Commission. The Commission was not attempting to act on a matter with which it had no function or concern.

CONCLUSION

The Committee's Brief does not attempt to meet the matter presented. It ignores the language of the Plan. It makes no attempt to argue that the Plan, literally construed, requires more than reduction of our "claim" or requires reduction of the new securities allotted to The Railroad Credit Corporation because of retention by The Railroad Credit Corporation of the Debtor's distributive share under the Marshaling and Distributing Plan, 1931. It ignores the whole scheme of the Plan in general and in particular the basis of allotment of the new securities. It ignores the history of the precise provisions under consideration. It tacitly concedes that the three reasons suggested by the District Court in support of its order do not support the result.

It is respectfully submitted that the portions of the District Court's order of September 14, 1944, appealed from by The Railroad Credit Corporation, are erroneous and that the appeal of The Railroad Credit Corporation should be disposed of as suggested in its Opening Brief.

Dated at San Francisco, May 31, 1945.

ARTHUR B. DUNNE

Attorney for Appellant,

The Railroad Credit Corporation

EDWARD G. BUCKLAND,

WILLIAM J. KANE,

Of Counsel

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

THE WESTERN PACIFIC RAILROAD
CORPORATION,

Appellant,

vs.

No. 10,966

THE RAILROAD CREDIT CORPORATION,

Appellee.

(CONSOLIDATED
CASES)

THE WESTERN PACIFIC RAILROAD
CORPORATION (a corporation),

Appellant,

vs.

No. 10,962

THE RAILROAD CREDIT CORPORATION
(a corporation),

Appellee.

**CLOSING BRIEF OF APPELLANT,
THE WESTERN PACIFIC RAILROAD CORPORATION.**

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Of Counsel.

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PAUL P. O'BRIEN,
CLERK

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IN THE
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Appellee.

**CLOSING BRIEF OF APPELLANT,
THE WESTERN PACIFIC RAILROAD CORPORATION.**

PRELIMINARY STATEMENT.

There have been filed in connection with the appeals of The Western Pacific Railroad Corporation in the matters now before this Court, designated as No. 10,962 and No. 10,966, the opening brief of this appellant and the reply brief of the appellee, The Railroad Credit Corporation.

There have been filed, in the matter designated as No. 10,962, the opening brief of the appellant, The Railroad Credit Corporation, and the reply brief of the appellees, Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, the members of the Reorganization Committee of The Western Pacific Railroad Company, Debtor.

The position now taken by The Railroad Credit Corporation with respect to the issues involved in these three appeals is set forth in part in its opening brief as appellant in No. 10,962, and in part in its reply brief as appellee in the other two appeals, No. 10,962 and No. 10,966. In the latter The Railroad Credit Corporation refers to and includes much of the theory and argument included in the opening brief on its own appeal.

The Western Pacific Railroad Corporation assumes, therefore, that in pursuance of the Stipulation and the Order consolidating the three appeals (R. 10,962, pp. 185, 189; R. 10,966, pp. 32, 36), it may in this closing brief refer to and analyze the contentions advanced by The Railroad Credit Corporation as appellant or appellee, in the three appeals.

ARGUMENT.

An analysis of the contentions presently made by and on behalf of The Railroad Credit Corporation with regard to the value of the new securities it receives under the Plan of Reorganization, and its claimed right to resort further to the accommodation

collateral furnished by The Western Pacific Railroad Corporation, reflect an interesting change of position from that advanced by its counsel on its behalf before the District Court, at the hearing of June 2, 1944.

1. *In the District Court*, its position was that the allotment of new securities to it was based on the amount of general and refunding bonds of the debtor which it held as collateral; that the *market value* of the new securities to be issued was totally insufficient to satisfy its claim; and that *in the event that the market values of these new securities proved to be worth less than its claim*, it was entitled to proceed against the accommodation collateral furnished by The Western Pacific Railroad Corporation. These contentions are clearly stated by the learned Judge of the District Court in his corrected Memorandum Opinion and Order, filed June 22, 1944. (R. 10,962, p. 98, at pp. 104 and 107.)

Indeed, the contentions *then* made by the Credit Corporation are further reflected by the District Court in its final Order Construing the Plan, made September 14, 1944 (and approved as to form by counsel for the RCC), in which the District Court finds: "That the rights of The Railroad Credit Corporation under its pledge agreement * * * will not be affected by the issuance of the new securities * * * and The Railroad Credit Corporation is entitled to proceed against the collateral so pledged *to the extent that the actual value* of such new securities shall not satisfy its claim." (R. 10,962, p. 143, at pp. 145-146, par. (e).)

2. *Before this Court*, it is apparently no longer contended that the Credit Corporation has not been made whole because of the market prices of the securities it received. Market prices, whether higher or lower than the values fixed by the Commission, are not now the basis of its contention that its claim has not been satisfied.

The *present* contention appears to be that the Commission fixed a maximum value on the pledged General and Refunding Bonds of \$359.3367 per \$1000 of principal and interest; that at this price or rate per bond The Railroad Credit Corporation has received only the equivalent of \$1,437,346, in *all* the new securities allotted it under the Plan, regardless of the values fixed upon them by the Commission, exclusive of \$26,091.72 received from the Marshalling and Distributing Plan; that this leaves an uncompensated balance of its claim of \$1,127,486 for which it expects to absorb the accommodation collateral.

The theory by which counsel for the Credit Corporation work out a maximum value for General and Refunding Bonds is set forth on page 17 of its Opening Brief on its appeal in No. 10,962. The formula by which then then find an uncompensated balance of their claim is set forth on page 35 of the same brief.

This theory and formula are ingenious. They are unsound as a matter of mathematics, and of fact, because they ignore very vital features of the Plan. We believe they are equally unsound as a matter of law.

THE RAILROAD CREDIT CORPORATION'S THEORY
AND FORMULA ARE UNSOUND IN FACT.

Counsel for The Railroad Credit Corporation say that the value which the Interstate Commerce Commission placed on the General and Refunding Bonds must be no more than \$359.3367 per \$1000 bond, because (a) this is the price at which \$10,750,000 principal amount of such pledged bonds would pay off a debt to Reconstruction Finance Corporation, secured thereby, in the amount of \$3,862,869, and (b) after making such application of pledged collateral at that value there is nothing left over for a junior lienor.

The fact is that the claim of Reconstruction Finance Corporation was satisfied *not* by application and use of its own collateral, but through the issue of the same securities, and in the same portions, as the First Mortgage Bonds, with which it was accorded a parity as compensation for its purchase at par of \$10,000,000 of New 4% First Mortgage Bonds. This special treatment accorded Reconstruction Finance Corporation resulted in the allotment to it of substantially *increased* amounts of new income bonds and new preferred stock, and a very substantial *decrease* in the number of shares of new common stock as against the number of shares of new common stock which would have been issued to it, if it had been accorded the treatment warranted only by its own collateral. This decrease made available for Railroad Credit Corporation and for A. C. James Company a much larger number of shares than either would have received if they had been treated on the basis of

their own collateral, and Reconstruction Finance Corporation had not been accorded special treatment.

Under the Plan, the Commission expressed the *value of the estate of the debtor*, through its authorization of aggregate new securities (in addition to undisturbed equipment obligations and the new \$10,000,000 First Mortgage Bonds issued to RFC) as follows:

New Income Bonds	New Preferred Stock	No Par Shares
\$21,219,075	\$31,850,297	319,441

Of these, the Commission held that the three holders of General and Refunding Bonds were entitled, by reason of a first lien on certain assets of the debtor to receive:

New Income Bonds	New Preferred Stock	No Par Shares
\$ 732,010	\$ 1,147,955	—

Subtracting these, the First Mortgage Bondholders held a first lien on all the remaining assets, and would be entitled to:

New Income Bonds	New Preferred Stock	No Par Shares
\$20,487,065	\$30,702,342	197,271 (at \$57 per sh.)

On the Plan of the Commission, First Mortgage Bondholders agreed to accept:

New Income Bonds	New Preferred Stock	No Par Shares
\$19,716,040	\$29,574,060	230,593

They therefore accepted 33,322 *more* common shares (at \$57) than they were required to take under the strict priority rule of the *Boyd* case (*Northern Pacific*

Ry. Co. v. Boyd, 228 U. S. 482, 33 Sup. Ct. 554), and they *gave up* and sent down to junior creditors:

New Income Bonds	New Preferred Stock	No Par Shares
\$ 771,025	\$ 1,128,282	88,847

These three junior creditors held as collateral Refunding bonds in the aggregate of \$18,899,500. Of these, Reconstruction Finance Corporation held 56%; Railroad Credit Corporation, 21%; A. C. James Company, 23%.

If the new securities representing the assets on which these three creditors held a *first lien*, plus these 88,847 shares, had been divided strictly in accordance with their holdings of Refunding Bonds, the result would have been:

		New Income Bonds	New Preferred Stock	No Par Shares
RFC	56%	\$409,925.60	\$542,824.80	49,754
RCC	21%	153,722.10	241,070.55	18,658
ACJ	23%	168,362.30	264,029.65	20,435

In fact, the Plan adopted by the Commission and approved by the Supreme Court, gave these creditors:

	New Income Bonds	New Preferred Stock	No Par Shares
RFC	\$1,186,200.00	\$1,777,800.00	15,788
RCC	154,111.00	241,681.00	35,424
ACJ	163,724.00	256,756.00	37,635

By this adjustment, the Plan gave to the First Mortgage Bondholders full compensation for their claim at the values fixed by the Commission; to RFC practically all of the new Income Bonds and Preferred Stock sent down by the First Mortgage Bondholders but required RFC to send down 33,966 shares

of stock to satisfy the claims of RCC; then gave to RCC all the New Income Bonds and Preferred Stock to which it was entitled, as shown above, *plus 16,766 shares which came down from RFC*, in addition to the 18,658 to which it was entitled as outlined above. To ACJ it gave slightly less in New Income Bonds and Preferred Stock, and *sent down from RFC 17,200 additional shares*.

These additional shares to RCC and ACJ were to be taken at \$62 per share; at that price they were adjudged by the Commission *sufficient to make RCC whole*, to refund in full its claim. There can be no other conclusion, because if the Railroad Credit Corporation had *not* been made whole, the Commission could not, without violating the rights of the Credit Corporation as junior lienor of the collateral held by Reconstruction Finance Corporation, allot to A. C. James Company any shares in addition to those to which it was entitled by reason of the collateral it held.

The Commission could not with propriety, or as a matter of law, give these 17,200 additional shares to A. C. James Company unless (a) The Credit Corporation had been made whole and (b) the accommodation collateral it held, furnished by this appellant, had been released.

These additional shares actually came, not from Reconstruction Finance Corporation but at the expense of the First Mortgage. Reconstruction Finance Corporation received, as pointed out, larger allotments of Income Bonds and Preferred Stock than it would

have been entitled to solely by reason of the collateral it held. These came out of the estate of the First Mortgage, and are taken out *before the Commission made its valuation of the new common stock.*

So while the Commission says in so many words that it exhausted the value of the collateral of Reconstruction Finance Corporation, it did not do so *until* it had taken out the additional elements of value which were passed down to the two junior secured creditors. The language of the Commission leaves much to be desired in the way of clarity. But it seems clear that the Commission did make a computation of the value of the Refunding Bonds pledged to secure Reconstruction Finance Corporation, as collateral, and the process by which it did so is clear.

The estate underlying the General and Refunding Mortgage, as developed under the Plan of Reorganization consists of two parts:

Parcel One: the part of the debtor's estate upon which all of the Refunding Bonds constituted a first lien, valued by the Commission at \$1,879,965. Of these bonds, 56% belonged to RFC, valued at \$1,052,780.

Parcel Two: 88,847 shares of new common stock of which, strictly, Reconstruction Finance Corporation was entitled to 56%, or 49,754 shares.

Reconstruction Finance Corporation's claim was \$3,862,899. Deduct its share of the value of Parcel One; the difference is \$2,810,089. The final mathematical problem is: at what price must 49,754 shares be taken in order to provide \$2,810,089. The answer is \$56.48.

It therefore seems clear that the Commission used \$57 as a value on the new common stock (a) since it would make whole both the First Mortgage Bondholders and Reconstruction Finance Corporation to the full amount of their claims and (b) since it would equal and exhaust the value of the collateral held by Reconstruction Finance Corporation. Whether correctly or not as a matter of law, the Commission further found that the Railroad Credit Corporation's equity in the collateral securing the claim of Reconstruction Finance Corporation was without value. The Supreme Court affirmed this view. And this figure, it must be remembered, gives effect to the \$5 differential representing compensation to senior lienors for the surrender of their first lien position and other elements of value constituting their "bundle" of senior rights.

Northern Pacific Ry. Co. v. Boyd, 228 U.S. 482,
33 S. Ct. 554;

Group of Investors v. Milwaukee R.R. Co., 318
U.S. 523, 563, 569;

Ecker v. Western Pacific R.R. Corp., 318 U.S.
448, 484, 488;

Consol. Rock Products Co. v. DuBois, 312 U.S.
510.

The figures presented and argued by the Credit Corporation as applicable to its claim fail, mathematically as well as in law, to afford any possible basis by which the claims of creditors could be satisfied. Deduct from its figure of \$1,437,346 as the full value of the Refunding Bonds it held (see p. 35, RCC opening brief, No. 10,962) the value of the New

Income Bonds and Preferred stock it received (\$395,792) and there is left a figure of \$1,041,554. Divide this by the number of shares it received, 35,424, and the result is a price of only \$29.40 at which it would receive the *same shares which two senior creditors must accept at \$57*. And still the Credit Corporation would claim the right to realize on outside, accomodation collateral!

Suppose we check it from a different point of view. The Supreme Court has held that the Commission found a total value of the estate of the debtor amounting to \$84,000,000 and more. (*Ecker v. Western Pacific R.R. Co.*, 318 U.S. at 456-457.) The aggregate claims of Trustees Certificates, Equipment obligations and First Mortgage Bondholders were \$75,278,128. (RCC opening brief, No. 10,962, p. 7). Clearly there was left in the debtor's estate a residue ranging from \$9,000,000 upward for the three holders of Refunding Bonds. But on the basis of the contention advanced on page 17 of the Credit Corporation's opening brief these three junior creditors held bonds worth only \$6,827,207 at most. (RCC opening brief No. 10,962.) *What then becomes of \$2,000,000 to \$3,000,000 of that residue not accounted for by the Credit Corporation's formula?*

Furthermore, if as the Supreme Court held, the value of the debtor's property soundly valued by the Commission exceeded \$84,000,000, and a residue of \$9,000,000 remained, *after refunding in full* the prior obligations, for the holders of Refunding Bonds, that residue was sufficient to satisfy in full the RFC and

RCC claims, and to satisfy the ACJ claim to the extent that the latter was secured. We respectfully contend that there is no other answer mathematically possible.

THE THEORY AND FORMULA OF RAILROAD CREDIT CORPORATION IS UNSOUND AS A MATTER OF LAW.

In its two briefs, the Railroad Credit Corporation reviews at great length the history of the entire reorganization proceeding of the debtor company, endeavors to interpret the provisions of the Plan approved by the Commission, states at length its theory and formula upon which it bases its contention that its claim has not been satisfied by the Plan, and that it should be permitted, in addition to accepting the full new securities allocated to it by the Plan, to hold payments of moneys from the Marshaling and Distributing Plan, and to hold and resort to the Accommodation Collateral furnished by this appellant. This it seeks to justify by an argument which it bases upon the full priority doctrine of *Northern Pacific v. Boyd*, 228 U.S. 482, 33 Sup. Ct. 554.

We believe the argument overlooks the simple essence of the law as it is repeatedly stated in the cases we have cited, referred to with approval by the Supreme Court in confirming this Plan on appeal. (*Ecker v. Western Pacific R.R. Co.*, 318 U.S. 448.) This we believe can be stated simply and briefly.

The Commission is required, in formulating and submitting to the District Court under the applicable pro-

visions of the bankruptcy act, to ascertain (a) the extent of the claims against the debtor, separately and in the aggregate, (b) to ascertain and express, either by an appraised or physical valuation of the property of the debtor, or by setting forth in terms of new securities to be issued to refund these claims, the value of the debtor's estate, and (c) to allocate these securities, not at fanciful or unsound but at true values, to the creditors to the full extent of the estate of the debtor, and in strict conformity to the rules of priority set forth at length in the cases cited by the Supreme Court in the *Ecker* case, *supra*.

The claims of senior creditors *must be satisfied* in full, before the claims of junior creditors may be allocated anything. Secured creditors take priority over unsecured claims. No senior creditor may be required by the Plan to sacrifice any of his full priority rights, except that a Plan may be fair and equitable wherein some new securities of the highest rank are allotted to junior lienors, and new securities of lesser rank to senior claimants, provided adequate compensation is given the latter for the sacrifice of full priority rights.

We respectfully submit that it is abundantly clear from the provisions of the Plan that this is precisely what the Commission did.

We submit that, *unless* the new securities allotted were to be accepted by the First Mortgage Bondholders in full satisfaction of their claim, *at the values* fixed by the Commission, the Plan could not conform to the doctrines approved by the Supreme Court. (TR-9714, pp. 390, 391, par. 2.) For identical reasons, the

claim of Reconstruction Finance Corporation was refunded in full. (TR-9714, pp. 391, par. 3.) And the Commission says, in so many words, that the new securities are issued "*in respect of its claim*", not to pay off collateral bonds which it held.

We submit that in dealing with the claims of Railroad Credit Corporation and A. C. James Company the Commission used the same language. True, it recognized the value of these claims as being in proportion to the collateral held by these creditors, with the result that the Credit Corporation was paid in full; A. C. James Company, its claim being only partially secured, was partially paid but *on the same basis*. It was the *claims*, not the collateral, that were to be paid, as far as each was secured. This is all that was meant by the statement of the Commission referred to at page 19 of the Reply Brief of the Credit Corporation.

We submit that, under the law the Commission could not allot senior claimants no-par common stock at \$57 per share, and junior claimants the same stock at \$29.40 per share. Nor did the Supreme Court approve any such provision or plan. To have done so would have constituted a reversal of the cases heretofore decided and followed by the Supreme Court.

**ACCEPTANCE OF PLAN BY RAILROAD CREDIT CORPORATION
EXONERATES ACCOMMODATION COLLATERAL.**

The following statement appears at page 689 of the printed record on appeal to the Circuit Court of Appeals for the Ninth Circuit in the main proceeding for the reorganization of The Western Pacific Railroad Company entitled "In the Matter of The Western Pacific Railroad Company, a corporation, Debtor", and numbered 9714 on the docket of the Circuit Court of Appeals:

"8. Paragraph O declares that the approval and confirmation of the plan shall in no wise disturb or alter the right and interest of the R.F.C. and the R.C.C. in collateral pledged with them by parties other than the debtor.

"Obviously the R.C.C. will not accept out of hand a plan which does not adequately provide for its claim, especially when acceptance would cut off the security of collateral pledged with it by third parties. Whether such security (656) is cut off or not is dependent upon established principles of law which cannot be altered by any provision in an order of this Commission."

The foregoing is an extract from the Petition dated December 9, 1938, filed by The Railroad Credit Corporation asking a modification of a Plan of Reorganization approved by the Interstate Commerce Commission by its Report and Order dated October 10, 1938.

This statement made by The Railroad Credit Corporation over the signature of its own counsel is a correct statement of the law as we understand it. In

calling this statement to the attention of the Circuit Court of Appeals, we respectfully call attention to the following allegation in the Bill of Complaint of The Western Pacific Railroad Corporation against The Railroad Credit Corporation, No. 10,966, Rec. page 4:

“That subsequent to the decision of the Supreme Court of the United States rendered March 15, 1943, said Plan of Reorganization was submitted by the Interstate Commerce Commission pursuant to said Section 77 of the Bankruptcy Act, as amended, for acceptance or rejection by all classes of creditors of The Western Pacific Railroad Company entitled to vote thereon, and was accepted by more than 66 $\frac{2}{3}$ % of each class of such creditors including the defendant, The Railroad Credit Corporation, which took such action without asking or securing the approval and consent of the plaintiff as the owner of the accommodation collateral hereinbefore specified.”

We respectfully submit that the claim of The Railroad Credit Corporation has been paid in full by the new securities allotted to it; that the values at which they are to be taken are now *res adjudicata*; that the Plan, and the provision for the funding of its claim, were accepted by the Credit Corporation; that the accommodation collateral furnished by this appellant is exonerated; that the Order of the District Court made June 19, 1944, and the Judgment entered August 7, 1944 in action No. 23,307-S in said Court should be reversed; and that the Order Construing Plan of Reorganization, made September 14, 1944 in the District Court, and particularly paragraph 5 thereof deal-

ing with the Accommodation Collateral should be reversed.

Dated, Oakland, California,
June 1, 1945.

LEROY R. GOODRICH,
Attorney for Appellant,
The Western Pacific Railroad
Corporation.

F. C. NICODEMUS, JR.,
Of Counsel.

No. 10965

United States
Circuit Court of Appeals
For the Ninth Circuit.

MABEL HELEN LOWERY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

FILED

APR 23 1945

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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*Page numbering appearing at foot of page of original certified Transcript of Record.

United States District Court
Western District of Washington
Northern Division

May Term, 1944

No. 46512

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MABEL HELEN LOWERY, alias May Lowery,
alias Mabel Cheney,

Defendant

INDICTMENT

Vio. Sec. 2553a Internal Revenue Code and Sec.
174, Title 21, U.S.C.A.

United States of America
Western District of Washington
Northern Division—ss.

The grand jurors of the United States of America
being duly selected, impaneled, sworn, and charged
to inquire within and for the Northern Division of
the Western District of Washington, upon their
oaths present: [2]

COUNT I.

(2553a I.R.C. — Sale)

That Mabel Helen Lowery, alias May Lowery,
alias Mabel Cheney, on the 5th day of May, in the
year of Our Lord One Thousand Nine Hundred
Forty-four, at the City of Seattle, in the Northern

Division of the Western District of Washington, and within the jurisdiction of this Court, then and there being, did then and there knowingly, wilfully, unlawfully, and feloniously sell, dispense and distribute a certain derivative and preparation of Opium, to wit: Twenty-five (25) grains of Opium Prepared For Smoking, which said preparation of opium was not then and there in nor from the original stamped package containing said preparation of opium, to wit: Opium Prepared For Smoking; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [3]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

COUNT II.

(2553a I.R.C. — Sale)

That Mabel Helen Lowery, alias May Lowery, alias Mabel Cheney, on the 8th day of May, in the year of Our Lord One Thousand Nine Hundred Forty-four, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, then and there being, did then and there knowingly, wilfully, unlawfully, and feloniously sell, dispense and distribute a certain derivative and preparation of Opium, to wit: Three Hundred (300) grains of Opium Prepared For Smoking, which said preparation of opium was not then and there in nor from the original stamped package containing said prep-

aration of opium, to wit: Opium Prepared For Smoking; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [4]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

COUNT III.

(2553a I. R. C. — Possession)

That Mabel Helen Lowery, alias May Lowery, alias Mabel Cheney, on the 9th day of September, in the year of Our Lord One Thousand Nine Hundred Forty-four, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, then and there being, did then and there knowingly, willfully, unlawfully, and feloniously, and not in the original stamped package, nor from the original stamped package, purchase from a person whose name is to the grand jurors unknown, a quantity, to wit: Four Hundred (400) grains of a certain compound, manufacture, salt, derivative, and preparation of Opium, to wit: Opium Prepared For Smoking; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [5]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

COUNT IV.

(2553a I. R. C. — Possession)

That Mabel Helen Lowery, alias May Lowery, alias Mabel Cheney, on the 9th day of September, in the year of Our Lord One Thousand Nine Hundred Forty-four, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, then and there being, did then and there knowingly, willfully, unlawfully, and feloniously, and not in the original stamped package, nor from the original stamped package, purchase from a person whose name is to the grand jurors unknown, a quantity, to wit: Ten (10) grains of a certain compound, manufacture, salt, derivative, and preparation of Opium, to wit: Opium Prepared For Smoking; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [6]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

COUNT V.

(174 - 21)

That Mabel Helen Lowery, alias May Lowery, alias Mabel Cheney, hereinafter called the defendant, to wit: On or about the 9th day of September, 1944, at the City of Seattle, County of King, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Honor-

able Court, then and there being, did then and there violate the Act of February 9, 1909, as amended by the Act of May 26, 1922, in that he, the said defendant, did then and there willfully, unlawfully, knowingly, feloniously and fraudulently receive, conceal, buy, sell and facilitate the transportation and concealment after importation of a certain derivative and preparation of Opium, to wit: Four Hundred Ten (410) grains of Opium Prepared For Smoking, which said preparation of opium, as the defendant then and there well knew had been imported into the United States contrary to law.

Against the peace and dignity of the United States of America and contrary to the form of the statute of the United States of America in such case made and provided.

J. CHARLES DENNIS

United States Attorney.

ALLAN POMEROY

Assistant United States

Attorney [7]

[Endorsed: A true bill, Frank W. McDermott, Foreman. J. Charles Dennis, United States Attorney.

[Endorsed]: Presented to the Court by the Foreman of the Grand Jury in open Court, in the presence of the Grand Jury, and Filed in the U. S. District Court, Oct. 25, 1944. Judson W. Shorett, Clerk, By Lee L. Bruff, Deputy. [8]

[Title of District Court and Cause.]

ARRAIGNMENT AND PLEA

Now on this 3rd day of November, 1944, Allan Pomeroy, Assistant United States Attorney appearing for the plaintiff and attorney Henry Clay Agnew appearing for the defendant this cause comes on before the Court for arraignment and entry of plea of the defendant, Mabel Helen Lowery, alias May Lowery, alias Mabel Cheney. At this time the defendant states her true name to be Mabel Helen Lowery. Reading of the Indictment is waived and the defendant now enters a plea of Not Guilty on all counts as charged in the Indictment. Order is entered directing the Clerk to place the case on the Call Calendar for assignment for trial, November 7, 1944 at 10 A.M.

Journal Volume 34, Page 8 [9]

[Title of District Court and Cause.]

VERDICT

We, The Jury In The Above-Entitled Cause,
Find the defendant Mabel Helen Lowery

Not guilty on Count I of the Indictment as
charged; and further find the defendant Mabel
Helen Lowery

Not guilty on Count II of the Indictment as
charged; and further find the defendant Mabel
Helen Lowery

Not guilty on Count III of the Indictment as charged; and further find the defendant Mabel Helen Lowery

Is guilty on Count IV of the Indictment as charged; and further find the defendant Mabel Helen Lowery

Not guilty on Count V of the Indictment as charged.

HAROLD W. BOYD

Foreman

[Endorsed]: Filed Dec. 20, 1944. [10]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now defendant and moves for a new trial for the following reasons:

1. That the verdict was contrary to the evidence;
2. Errors of law occurring at the trial and excepted to by the defendant;
3. That the powder case seized from defendant's purse was taken from the defendant according to the undisputed proof in violation of her constitutional rights against unreasonable searches and seizures.
4. That defendant did not have a fair and impartial trial as to the issues of count four by reason

of the submissions to the jury of the evidence relative to the remaining counts.

HENRY CLAY AGNEW

Attorney for Defendant

[Endorsed]: Filed Dec. 23, 1944. [11]

[Title of District Court and Cause.]

MOTION IN ARREST OF JUDGMENT

Comes now the defendant and moves for an arrest of judgment herein for the following reasons:

1. That the verdict was contrary to the evidence and that none of the evidence legally obtained supported said verdict and that it appeared from the conceded testimony that the evidence upon which the conviction rested as to Count Four was seized in violation of the constitutional rights of the defendant.

HENRY CLAY AGNEW

Attorney for Defendant

[Endorsed]: Filed Dec. 23, 1944. [12]

United States District Court
Western District of Washington
Northern Division

No. 46512

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MABEL HELEN LOWERY, alias May Lowery,
alias Mabel Cheney,

Defendant.

JUDGMENT AND SENTENCE

Comès now on this 3rd day of January, 1945, the said defendant Mabel Helen Lowery, with Henry Clay Agnew, her attorney, into open Court for sentence, and being informed by the Court of the charges herein against her and of her conviction of record herein, she is asked whether she has any legal cause to show why sentence should not be passed and judgment had against her, and she nothing says, save as she before hath said.

Wherefore, by reason of the law and the premises, and the verdict of the jury finding the defendant guilty on Count IV of the Indictment, it is

Considered, Ordered and Adjudged by the Court that the said defendant Mabel Helen Lowery, is guilty as charged in Count IV of the Indictment and that she be committed to the custody of the Attorney General of the United States for imprisonment in the Federal Reformatory For Women,

at Alderson, West Virginia or in such other like institution as the Attorney General of the United States or his authorized representative may by law designate, for the period of Eighteen (18) months.

[13]

And the said defendant is hereby remanded into the custody of the United States Marshal for this District for delivery to the Warden of The Federal Reformatory For Women at Alderson, West Virginia, for the purpose of executing said sentence. This judgment and sentence for all purposes shall take the place of a commitment, and be recognized by the Warden or Keeper of any Federal Penal Institution as such.

Done In Open Court this 3rd day of January, 1945.

JOHN C. BOWEN

United States District Judge

Presented by:

ALLAN POMEROY

Asst. United States Attorney

Violation of Section 2553a Internal Revenue Code, and Section 174, Title 21, U.S.C.A. (Sale and Possession of Narcotics)

[Endorsed]: Filed Jan. 3, 1945. [14]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: Mabel Lowery
—727-28th South, Seattle, Washington.

Name and address of appellant's attorney: Henry Clay Agnew—1103 Smith Tower, Seattle, Washington.

Offense: Violation of Sec. 2553a Internal Revenue Code.

Date of Judgment: January 3, 1945.

Brief Description of Judgment or Sentence: Guilty of Count IV of the Indictment.

Sentence: Defendant sentenced on Count IV of the Indictment Custody of the Attorney General for confinement Alderson, West Va. for eighteen months.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above mentioned on the grounds set forth below.

MABEL LOWERY,

Appellant

1-3-45

By HENRY CLAY AGNEW

Her attorney

Grounds for Appeal: That the record affirmatively shows that a manifest injustice was done the defendant in that whatever evidence [15] tending towards proof of guilt as to Count IV was seized in violation of her constitutional rights and that knowledge of the true facts was concealed from the defendant by the acts of Federal Officers in showing false evidence for the purpose of deceiving the defendant. Error of the court in failing to grant a directed verdict as to Count IV. That defendant

did not have a fair trial by reason of the Court's admitting Counts III and V.

HENRY CLAY AGNEW

Attorney for Appellant

[Endorsed]: Filed Jan. 3, 1945. [16]

[Title of District Court and Cause.]

ORDER FIXING BOND ON APPEAL

This cause having come regularly before the court after verdict of guilty properly received and filed herein as to Count IV of the Indictment; and the court having considered the Motion in Arrest of Judgment and Motion for New Trial and the same having been denied by the court; and the court having thereupon by judgment found the defendant guilty as to said Count and sentenced the defendant in accordance with the terms of the Judgment and sentence as they appear on file herein; and the defendant having regularly filed her Notice of Appeal from such judgment and sentence;

It Is Ordered that defendant be and she is hereby allowed release upon bond pending appeal and that said bond be and the same is hereby fixed in the sum of \$3000.00 and to be in a form approved by the court.

Done In Open Court this 3d day of January,
1945.

JOHN C. BOWEN

Judge

Presented by:

HENRY CLAY AGNEW

Attorney for Defendant

[Endorsed]: Filed Jan. 3, 1945. [17]

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD
ON APPEAL

To The Clerk Of The Above Entitled Court:

It is requested that you prepare and certify a copy of the following documents and proceedings of record in your court, which said documents and records are necessary to a determination of the above case in the Appellate Court:

- 1: Indictment,
- 2: Arraignment,
- 3: Plea,
- 4: Verdict,
- 5: Notice of Appeal,
- 6: Motion for new trial,
- 7: Motion for arrest of judgment,
- 8: Order fixing bond on appeal,
- 9: Assignment of Errors,

10: Bill of Exceptions,

11: This praecipe

HENRY CLAY AGNEW

Attorney for Defendant.

[Endorsed]: Filed Feb. 20, 1945. [18]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD
ON APPEAL

United States of America,

Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered from 1 to 18, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same, together with the original Bill of Exceptions and Assignment of Error, sent up as part hereof, constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit: [9]

Clerk's fees (Act of Feb. 11, 1925) for making record, certificate or return:

1 folios at 5c	\$.05
30 folios at 15c	\$ 4.50
Appeal fee (Section 5 of Act)	\$ 5.00
Certificate of Clerk to Record on Appeal	\$.50

Total \$10.05

I hereby certify that the above amount has been paid to me by the attorney for the appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 27th day of February, 1945.

[Seal]

MILLARD P. THOMAS,

Clerk,

By SIGFRIED HENDRICKSON

Deputy [20]

[Title of District Court and Cause.]

BILL OF EXCEPTIONS.

Be It Remembered that heretofore and on to-wit: December 19, 1944, at the hour of 10:00 A.M., the above-entitled cause came regularly on for trial in the above court before the Honorable John C. Bowen, Judge of said Court;

Plaintiff appearing by Allan Pomeroy, Assistant United States District Attorney;

Defendant appearing by Henry Clay Agnew, Esq., her attorney and counsel;

Whereupon the following proceedings were had:

[1*]

(Whereupon, counsel for the Plaintiff made his opening statement to the jury; counsel for the Defendant reserving his opening statement.)

HUGH RINGSTROM,

called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

My name is Hugo Ringstrom. I am a chemist for the Alcohol Tax Unit. I do work regularly for the Treasury Department of the United States since 1923.

Plaintiff's Exhibit 1 contains 25 grains of smoking opium which I have tested. I received it from agent Van Treel, on May 6, 1944, and I have had it in my possession ever since.

*Page numbering appearing at foot of page of original Bill of Exceptions.

(Testimony of Hugh Ringstrom.)

Government Exhibit 2 contains 300 grains of smoking opium which I received from Agent Van Treel on May 10, 1944, and I analyzed it.

Plaintiff's Exhibit 3 contains approximately 250 grains of smoking opium which I examined and received from Agent Van Treel on September 14, 1944, and have had in my possession ever since.

Plaintiff's exhibit 4 is a powder puff containing a bindle of smoking opium of 8 grains. I received it from Agent Van Treel September 14, 1944, and have had it in my possession ever since.

Cross Examination

Exhibit 4 is in the form of one large pill with considerable small fine stuff that has broken off.

MAR GIM WING,

called as a witness on behalf of the Plaintiff, being first duly sworn testified as follows:

Direct Examination [2]

My name is Mar Gin Wing. I usually go by the name of Harry Mar. I will be thirty-six years old in February. For the past two years I have been mining. I also drove a cab in Seattle. I did own a cab company. I was born in Seattle and have lived here practically all my life. I am an American citizen. I know Mabel Lowery and have for about three years. I have been charged in this court and pleaded guilty to possession of opium, but have not

(Testimony of Mar Gim Wing.)

been sentenced yet. I saw Mabel Lowery on September 9. It was the same day I was arrested by the Narcotic Officers at 7th and King in Seattle. I had just left the cab office and had opium in my possession. It was a 50 fun jar. The officers took me to the Federal Building. I gave them the jar. After I came to the Narcotic Office with the officers I telephoned Mabel Lowery. Officer Van Treel was listening on the 'phone. She told me she had been waiting quite a while for me, and I told her I was not able to obtain a cab, and she told me she was waiting, and I told her I would be up. She says "you bring it up to me" and I told her I did not have a car but I would try to get a friend's car. That was about the extent of the conversation. I had seen her three days before at her home. She ordered a cab and I took her down town. She said she was ill and if possible to find a place and get her some. She asked me the price and I said approximately a hundred or one hundred twenty-five. I don't know exactly what the 50 fun jar means. It refers to the contents, which is a measurement of weight. Prior to this time I had not seen Mabel Lowery for two or three months. After the telephone conversation with Mabel Lowery from the Narcotic Office I went to the garage with Mr. Bangs, who is a Narcotic Officer. Officers Van Treel and Mr. Hyde went along. This was at 8th and Weller. [3] I went with Mr. Bangs and Van Treel and Hyde went in their car. After we got there Mr. Bangs got out of the car and went behind

(Testimony of Mar Gim Wing.)

a garage. I went with him. The other officers were in the car right along side. Then Mr. Bangs released me from his custody and I proceeded to the house of Mabel Lowery. Mr. Bangs had the opium. It was behind the garage. He put it right along side of him, I guess. Then I went in the car alone. I was followed by officer Van Treel in the other car. I saw Mabel Lowery at her home. Her dog was ill and she wished me to take her to the veterinary, which I did. I told her I had put the opium away. She did not say any more, so we proceeded. We were at the veterinary's fifteen minutes or so. I went in with her. Then we went to 8th and Weller. We both got out of the car, she with the dog. I went directly behind the garage and Mr. Bangs gave me the opium and I returned to the car. I gave it to Mrs. Lowery. She did not give me the money at the time. She said she would pay me at the hotel, that is the Albany Hotel at 3rd and Madison. I understand she manages it. We did not go far. We were stopped by Officer Van Treel. They got the opium from the car, on the right hand side. It was placed there by Mrs. Lowery. It had been in her purse. She placed it there in the car after we stopped, when the policeman arrested us. She said "who are these people?" I said I did not know. Exhibit 3 looks like the opium jar that I gave Mrs. Lowery. I do not recognize Exhibit 4.

(Testimony of Mar Gim Wing.)

Cross Examination

I am not an addict but I have smoked it.

A. Mr. Agnew, I have only given to people at their request. I have never encouraged the sales.

Q. I didn't hear that. Haven you been selling narcotics for several years?

A. Not several years. [4]

Q. How many years? A. On and off.

Q. How many years have you been peddling?

A. I have never peddled.

Q. What is that?

A. I have never peddled.

Q. Well, we will call it selling, then.

A. That is right, sir.

Q. How many years have you been selling narcotics? A. For the last two years.

I was arrested around noon. I believe around 2 o'clock, at 7th and King near the taxi cab office. I do not own the cab company or have any interest in it. Mabel Lowery's home is on 28th South, about five or six blocks south of Jackson Street. Her hotel is the Albany Hotel on 3rd Avenue, near Marion. I have often taken her from her home to the hotel. Prior to my arrest she *she* had not called and asked me for a cab. That was not the conversation. She did have a sick dog to take to the veterinary. When I was arrested I had the narcotics in my right hand pocket. I had a check protector that I was taking to my sister's store. At the time I was arrested I was trying to keep this appointment. When I did keep this appointment it

(Testimony of Mar Gim Wing.)

was around 4:00 o'clock or so. In the intervening two hours I was in the United States Narcotic Office in the Federal Building. I voluntarily gave them the narcotics before I entered the building. They later searched my pockets. Officer Van Treel searched me. I knew Mrs. Lowery to be a user and an addict. I did not tell that to the Federal Officers. I did not have any car. They just gave me a car. They confiscated the cab after my arraignment. The car I used to go to Mabel Lowery's was given to me by the Federal Narcotic Officers. They did not tell me whose car it was. I didn't notice any license number on it. [5] I had no control about whether I should drive up to the house and sell her the drug up there. That was my own suggestion that I stop somewhere and leave the narcotics. That was my own idea. As I have said I refrain from all opinions on Miss Lowery.

Q. (Mr. Agnew): Isn't there any explanation of your reason why you didn't want to go right to May Lowery's house and sell her the narcotics up there? Why did you want to stop and hide the narcotics behind a garage?

A. Mr. Agnew, I just want to clarify my own conscience on what has happened.

Q. Your what?

A. My own conscience of what has happened.

The Court: "I want to clarify my own conscience as to what happened." You may speak.

The Witness: That is all I have to say on that.

Q. (Mr. Agnew): The question was, why did

(Testimony of Mar Gim Wing.)

you suggest to the Federal Officers that you stop and hide the drug somewhere instead of taking it right up to her house? What was the reason? That has nothing to do with your conscience, has it?

A. It has.

Q. Well, does your conscience say that you don't want to answer the question? Is that it?

A. That is right.

Q. You don't want to answer the question?

A. That is right.

When I left the Federal Court House Mr. Bangs was carrying the opium. Mr. Bangs released me at the garage but Mr. Van Treel followed me out to Mrs. Lowery's house. Mr. Bangs kept the opium. It was placed by an unoccupied building. To me it seemed like it was only a deserted shack. The building was my suggestion. From there it would be approximately a mile and a half to Mrs. Lowery's home. [6]

By arrangements with the Government Officers I was supposed to go back and pick up the narcotics. I took her to the veterinary first at Rainier and Dearborn. We were there fifteen minutes. I was in the same room with Mrs. Lowery at all times. I did not stay in the front office with her purse at any time. I raised no objection to her going to the veterinary. When we came to 8th and Weller I was driving. It was a sedan. Mrs. Lowery was in the front seat with me. She was holding the dog. I didn't notice that the dog threw up. When I stopped she did follow out after the dog.

(Testimony of Mar Gim Wing.)

I went behind the building. Mr. Bangs was there. I picked up the narcotics in his presence. He had told me to do that. All I have done is of my own volition. They have not guaranteed me anything. Nothing has been said to me about probation. When I plead guilty I asked for two weeks to settle my business.

When I got back from the garage she was already back in the car, or just getting into the car. I got into the car and gave the jar to Mrs. Lowery. She was sitting in the front seat. I gave it to her before the car started. The officers found it on the front seat between the driver and the passenger. I don't know which side. I know it was on her side of the car but where I don't know. I pleaded guilty to possession of this same jar. I did not admit several hundred sales to the Federal Officers. I admitted approximately five or six. I have not been working for them while out on bail. At the time I handed the jar to Mrs. Lowery I had closed the door of the car. We both sat in the front seat. I just handed it to her. She put it in her purse. I am not sure whether the dog was throwing up at the time. I did not notice that she was covered with anything from the dog. I would not consider that a poor time to carry out such a transaction. I don't remember any conversation whether or not she demanded that the police officers take finger prints on the jug. We were in [7] a different room after that. The man I got the jar from is not here now. I didn't ship it in. I don't know anything

(Testimony of Mar Gim Wing.)

about shipping it in. I have never had any profit from Mrs. Lowery. I do not buy any jars, only at the time she wanted. I told her this car belonged to a friend of mine. I had previously called her and told her that I could not get a cab but that I had a friend's car and would come up and get the dog and the stuff for her. When I talked in the presence of the Federal Officers I said "I have got it now." I didn't say "opium."

Redirect Examination

I never say "opium" over the telephone. I usually say "it." Not very many of my sales were made to Mabel Lowery, about three. I have never been employed by the Narcotic Bureau or received money from them. I have not received promises of what recommendation they will make to the court. At the time I handed her the jar she just took it and looked at it. I don't recall that she took the top off. She told me she would pay me at the hotel. She put it in her purse; then she took it out of her purse and put it along side of where she was sitting.

Recross Examination

I have made no other sales except to Vivian. I did not tell them all the sales I had made. I have not made any. I have received no promises in any way. Nothing was promised me.

A. M. BANGS

called as a witness by and on behalf of the plaintiff, being first duly sworn, testified as follows:

My name is A. M. Bangs. I am at present District Supervisor of the Bureau of Narcotics, stationed at Denver, Colorado. In September of this year I was District Supervisor stationed in Seattle. On September 9th I saw Harry Mar in my office on the third floor of this building. It was about 2:00 o'clock or a little later. He had been apprehended at that time by officers working for me. When he was arrested he had a jar of opium [8] in his possession. Exhibit 3 is the jar. I identify it from a mark that agent Van Treel put on it in my presence. I was present and heard Harry Mar's conversation over the telephone. He dialed a number and said "hello, Mabel. This is Henry Mar" or "this is Henry." He might have said "Harry." He said "I have got that but I can't get a taxi and I can't get out to your place right away on account of the gasoline shortage," or something, "I can't get a taxi cab but maybe I can borrow a car from a friend and come out to your house, but I don't want to carry it in the car. I will put it somewhere—I have got it somewhere and I will go and get it—I will come out and get you, and then we will come down and I will give it to you." That is substantially the conversation. I went with Harry Mar to 9th and Weller accompanied by Van Treel and Detective Lieutenant George Hyde. We parked our car there and I saw that Agent Van Treel and

(Testimony of A. M. Bangs.)

Mr. Hyde were right behind us. Mar and I went over to the opposite corner, and there was an old frame shack standing there. We went in behind that and I placed the jar on the ground, and told him "Now, here it is. It will be here when you come back." He left and I stayed with the jar. Van Treels followed him. He stayed a little way down the street on the other side. I did not plan this. Harry Mar planned it himself to a certain extent.

In about a half hour or a little better, Mar returned in the car, and I could look out from behind the building and see that Mabel Lowery was in the car with him. He came across to me and picked up the jar and went back to the car. She got out and stood outside the door on the curb. At that time I didn't see any dog. When he came across the street towards the car she got in on her side and he got in on the driver's side, which was towards me. Then they pulled away from the curb in a very short time and started south, and I saw Van Treel come in behind them and cut in front of them, and then I went down there, and [9] Van Treel and Hyde and placed the two people under arrest. I saw Van Treel reach down between the door and the seat and pick up this jar of opium. It was on the right hand side towards where Mabel Lowery was sitting. Mabel Lowery seemed very much surprised. We did not talk very much there. We got in our cars and went down to the building here and we went up to my office, and I had a brief conversation with

(Testimony of A. M. Bangs.)

her up there. Mr. Van Treel was present. I recognize Exhibit 4. It was found in her pocket book. The first time I saw it it was in my office. Van Treel pulled it out of her purse. As I recall it, it is three opium pills wrapped in cellophane paper. She denied know anything about them, that they were hers. She denied knowledge or ownership of it. She did not know anything about it or how it got in there. I asked her about the dog. She told me that he had been sick. I asked her what sort of treatment the veterinary had administered to the dog. She told me and pointed to her dress, and there was some matter on there, at least she said it had been expectorated by the dog. She denied knowing anything about the jar of opium. She told me she had known Harry Mar for some time and had been using his taxi cab off and on. She said the jar was not hers. She did not know anything about it. There was \$125 in her purse.

(Whereupon by stipulation of counsel made in Open Court Exhibit 5 was received in evidence, Exhibit 5 stating in substance as follows:)

“Received of Federal Narcotic Office, Seattle, Washington, the sum of \$125, the property of Mabel Lowery, it being understood that this receipt may be used in evidence, having the same force and effect as if the same funds took from her at the time of her arrest were introduced.”

(Testimony of A. M. Bangs.)

Cross Examination

I first saw the jar of opium after Harry Mar's arrest. When I placed it by the old building I kept my eye on it. [10] I don't recall what I said to Harry Mar when he came after it. I was out of sight of the street. It was his suggestion that it was carried on in this way. It was discussed in my office between Mar, Van Treel, Mr. Hyde and myself. We discussed it as to the various ways that it should be done and then most of the suggestions came from Mar himself as to the method of accomplishing it. I was in charge of the office. I understood that these narcotics were to be taken out and delivered to her in pursuance of a previous arrangement and understanding between them. I approved of this. I cannot answer "yes" or "no" as to whether or not she was an addict at this time. The last time I talked to her she absolutely denied using anything, and that wasn't very long before that. She looked to me like she might be at least temporarily abstaining. I did not search Harry Mar thoroughly.

GEORGE S. HYDE,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

My name is George S. Hyde. I am a Detective Lieutenant, Seattle Police Department. On September 9th I was working in cooperation with the

(Testimony of George S. Hyde.)

U. S. Bureau of Narcotics. I saw Harry Mar on that day walking across the street entering a taxicab. There were three other passengers in the cab. Mr. Van Treel, Federal Narcotic Agent, was with me. I asked him to walk up the block and sit in the car with us as we wanted to talk to him. He did and then we took him to the Federal Bureau of Narcotics' office in the Federal Court house. He had a jar of opium on his person, which he gave me in front of the Federal Court House Building. He had it in his right hand pants pocket. Exhibit 3 is the same jar. I was present when he had the phone conversation with Mabel Lowery. Mr. Van Treel was listening on the extension, and I believe also Mr. Bangs. I couldn't hear Mabel [11] Lowery but I could hear Harry Mar. He told her that he was coming up, or told her that he had something for her, and then there was some discussion about—he said he couldn't get a taxicab, he wasn't driving a cab, and he said he thought he could get a friend's car and that he would be up as soon as he could. After that we went to a garage on 9th and Weller. Mr. Van Treel and I went in one car and Mr. Bangs and Mar in the other. Mr. Bangs and Mar went behind a shed on the Southeast corner of 9th and Weller to place this jar of opium. Then Mar got back in one of the cars and drove away. Mr. Van Treel followed him and I stationed myself at a point on Weller Street between Eight and Ninth, on the north side of the street. Bangs remained behind the shed. About a half hour later

(Testimony of George S. Hyde.)

Mar came back. Mrs. Lowery was with him. Mar got out of the car and went across the street and back of the shed, and then I perceived him coming from the shed back again towards the car, and he got into the car. I didn't see whether or not Mabel Lowery got out of the car. After Mar got back in the car, in a few moments, he started driving towards where I was standing, and when they got about even with me, or a little past where I was standing, Mr. Van Treel came along in another car and turned them into the curb; and as they stopped I opened the car door on the right side of the car. Mrs. Lowery was sitting there. I seized Exhibit 3 immediately on opening the door. It was right along side of her, between her person and the car door, sort of in the ledge where the seat fits into the car. It was not between the driver and Mabel Lowery. It was between her and the door. She had a dog in her arms. Her purse was on her lap. It was closed. I first saw exhibit 4 in room 311, the Narcotics Office where Mr. Van Treel searched Mabel Lowery's purse. I did not look in it. I was [12] standing there. He found opium pills. We call them yen pocks. Mrs. Lowery had vomit all over her clothes from the dog. I could not say exactly how much was there but the dog had vomited on her, and she said that it had been sick after she had brought it out from the veterinary, that the veterinary had evidently given it something and that the dog had vomited on her. It looked more or less like it had been rubbed off. I cannot

(Testimony of George S. Hyde.)

say positively whether or not it had been on a few minutes or so because I didn't pay much attention to that. I am just giving my own opinion. It did look like it had been done possibly some minutes previously. It looked like it had been wiped off.

I said "Hello, Mabel," and she said, "Hello, Mr. Hyde," and I said "what are you doing with this?" and she said, "I don't know anything about it. It isn't mine." There was nothing else said at the time. She just wanted to know what it was all about, and then Mr. Bangs came down and she said she had some clothes in the car and could she take the clothes, so we transferred all the stuff from this car into another car, and she was worried about the dog, and they assured her that they would take care of the dog, and we told her that she was under arrest. She did not say anything to me about taking finger prints. Harry Mar suggested placing the jar behind the building at 8th and Weller. The Narcotic Officer said to him "you make the suggestions."

Cross Examination

No suggestion was made to Harry Mar by the Narcotic Officer that he would be better off if he helped the department out a little bit. He was given the opportunity to make a delivery in his own way. There was no promises or anything like that made in regards to his own status. He was told that he would be given an opportunity to go through with it if he wanted to. He was quite willing to go through with it. Nobody told him it

(Testimony of George S. Hyde.)

would be a good idea. There might have been something said along the [13] the lines of helping himself. The jar was wrapped up when it was in the car. I did not make tests for finger prints. I am not a finger print expert. Fingerprints could be obtained off glass or that kind of substance if they had been really pressed on there, although glass of this type can easily be smudged, and sometimes fingerprints aren't easily distinguishable. When we arrested Harry Mar there were three, or possibly four men in the car. They were Chinese. The cab had a driver. They were waiting for him and he was starting to get in. They must have seen him coming down the street. I don't know whether they were waiting for him or not. The cab opened the door for him. I called him before he had a chance to get in. If he was going up to Mabel Lowery's to sell her some opium he gave no explanation for why he had the three or four Chinese along.

Redirect Examination

After we arrived at the Federal Building with Mabel Lowery, when we got out of the car I was in possession of her purse. She asked me if she could have Exhibit 4. At that time it was inside her purse. I told her she could not get it then but she might get it later. Mr. Van Treel found the pills in the powder puff in my presence.

Recross Examination

I would say it was about fifteen minutes later that he found them. Mrs. Lowery was not left

(Testimony of George S. Hyde.)

alone with her purse at any time. She did ask me for some personal letters in the purse and she asked me for the powder puff. It would be the universal custom of an officer to search anything before giving it back to the defendant.

WALTER GRABEN

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows: [14]

(This witness gave testimony entirely confined to two counts of the indictment upon which the defendant was acquitted. None of said testimony, directly or indirectly, concerns counts 3, 4 and 5.)

JOHN H. VAN TREEL

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

(The testimony of this witness relative to counts 1 and 2 upon which defendant was acquitted is not set forth in this Bill of Particulars for the reason that it in no way, directly or indirectly, concerns counts 3, 4, 5 or the exceptions taken by the appellant.)

I am a Narcotic Agent and have been for twenty years. I saw Harry Mar in September of this year at 7th and King Street in Seattle. I was with

(Testimony of John H. Van Treel.)

Lieutenant Hyde and we took Harry Mar from 7th and King towards the United States Court House. I told Harry Mar that if he had anything to say, the truth would always be appreciated. We brought him to the office of the Bureau of Narcotics in Room 311 in this building. Exhibit 3 was handed to Lieutenant Hyde by Harry Mar in my presence just outside of this building. After we came to the building Harry Mar called Mabel Lowery on the telephone. I listened on the extension in the next office.

He said, "Hello, Mabel. This is Harry."

Mabel said, "Where have you been? Where are you?" She said "where have you been?"

"Well, I am downtown." She said, "Have you got that stuff?" He says, "Yes."

"Well, come on out." He said, "I can't get a cab." He said, "I have been trying to get a cab for the last hour. I can't get any cab."

"Well, bring it out and I will go downtown with you." She says, "Come right on out to the house. I am ready." He says, [15] "Well, I haven't got a car. Maybe I can get one from a friend of mine."

She says, "All right, come on out as soon as you can."

A little later we went to 8th and Weller. Lieutenant Hyde stayed on one side of the street and Mr. Bangs stayed behind a shed, and I followed Harry Mar to 727 28th Street South. He entered the house. After about 5 or 10 minutes he came

(Testimony of John H. Van Treel.)

out with Mrs. Lowery, who was carrying a dog, several hat boxes and clothes. They put it all into the back of the car and went back—went to Rainier Avenue, where the car stopped in front of the Rainier Veterinary Hospital. They were there ten or fifteen minutes. They came out of the hospital, re-entered the car, went to 8th and Weller. Mar parked the car and left and crossed the street and went behind the shed. Mrs. Lowery got out of the car. Mar was gone not over two or three minutes. When he came back they both got in the car. Harry Mar gave the signal that he was going to drive away from the curb and proceeded down Weller, and I stopped him about half a block down Weller by turning the car in front of him. By that time Lieutenant Hyde was already on the other side of the car, and I got out where Harry Mar was on the driver's side and stopped anything they would throw out or conceal. Hyde opened the door and I had Mar out of the car and had taken him around to the right side of the car, and at that time Lieutenant Lyde had picked up a jar of opium between the seat and the door. That is Exhibit 3. We came to the Federal Building where I searched her pocket book. She said, "I want to get some things out of there." I said, "All right, you can get certain things out when I am through looking at them." I found Exhibit 4 in her pocket book. It is opium prepared for smoking, mixed with yen shee dross. They are in the form of pills. Yen shee is the residue of opium after smoking. It would take

(Testimony of John H. Van Treel.)

quite a while to roll or prepare a pill like this. I have had Mabel Lowery under [16] observation since May. She took several trips to Vancouver, B. C. She took one to Los Angeles and several trips to Wallace, Idaho.

Cross Examination

I base my statements about her trips to Vancouver, B. C., and Los Angeles upon personal knowledge. I did not see her in Vancouver. I checked the Air Line Manifest when she left as a passenger bound for Vancouver. I did not see her take the plane. She made a statement to Mrs. Hogan that she made two trips to Los Angeles. I know about the trips to Vancouver through the United States Custom Service.

Elizabeth Hogan was paid one reward check on the two cases of Mabel Lowery and Harry Mar. It was \$250.00. She is still working with us.

Mr. Bangs procured the car that we gave Mr. Mar to go to Mrs. Lowery's house. To the best of my recollection it was a government car from some other agency. I do not believe it was an F.B.I. car.

When we were in the Federal Narcotic Office I took Mabel Lowery into our laboratory room and she did use a towel there to wipe off some matter on her coat or dress she had on.

ELIZABETH HOGAN

called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

(This witness testified entirely as to the matters mentioned in counts 1 and 2, upon which the defendant was acquitted, and none of her testimony had any bearing as to counts 3, 4, and 5.)

Plaintiff rests.

Mr. Agnew: The Defendant, your Honor, challenges the evidence as to counts 1, 2 and 3, the sufficiency of it to go to the jury, and asks the court to decide as to those counts as a matter of law and dismiss the case as to those three counts.

No, I have my counts wrong. It is as to the last three instead of the first three. [17]

ARGUMENT

The Court: My attitude is not such that I would decline to give you further time to argue that contention, Mr. Agnew, if the situation should make it appropriate, but at this time I do not feel that the court should rule, as a matter of law, in favor of your motion on any count.

So, for that reason, as to each and all its parts, as to each and all the counts, is denied.

The Court does not rule that under a not guilty plea, defendant cannot prove entrapment, nor does the court now rule that defendant is not entitled, at the present stage, to an instruction on entrap-

ment if the case should be submitted without further evidence.

The Court merely is of the opinion that the present evidence and record do not require a ruling that, as a matter of law, defendant has been entrapped by Government officers or that for any other reason defendant is entitled to a directed verdict.

Mr. Agnew: I think possibly I should reserve an exception.

The Court: Exception allowed.

B. A. KADANER,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

I am a veterinary surgeon with offices at 815 Rainier Avenue. I recall a day in the later fall when the defendant came in with a Chinese. As I recall, she walked in first with the terrier, and the Chinese cab driver walked in, he looked at the large chart on the wall, and I diagnosed the case as one which could be easily treated, and I treated it in the front room, and I believe the Chinese cab driver helped hold the dog while I gave it the medicine. [18]

I didn't notice Mrs. Lowery's purse at the time or where she laid it. I can't answer that the Chinese was alone in the room with her purse at the time. I don't know for sure.

MABEL HELEN LOWERY,

called as a witness on her own behalf, being first duly sworn, testified as follows:

I own the lease and furniture of the Albany Hotel. I did not take any trips to Los Angeles between May and September; neither did I go to Vancouver, B. C. I was in Idaho and returned September 6th. I did not have any conversation with Harry Mar about purchasing opium on September 9th. I called the China Cab Company about 1:30. He answered the telephone and said, "There is only two cabs running today," and he said "they are very, very busy." He said "I am not working today," and I told him I had to go to town because *because* I had a dog and I had to get to the veterinary and that I had got a lot of bundles and things which I had to move. He said "Well, I might be working later on in the day, if one of the cabs comes back from the garage." I said "Well, I would certainly appreciate it if you can get a car and come out after me." He says, "Well, I will do my best."

I next heard from him between 3:30 and 4 o'clock in the afternoon. He asked me if I was still waiting and I said "Yes" and he said, "Well, I have borrowed a friend's car and I *will out* and get you." He talked like he was excited and I could not hear very well, the line wasn't real distinct because I had to keep saying, "What, What?" to him. He said nothing about gasoline rationing. [19]

He came out in about a half hour and we carried

(Testimony of Mabel Helen Lowery.)

my stuff out to the car. We went to the veterinary where I walked to the window, I laid my purse and my sun glasses down on this little counter, and came around with the dog in my arms and put it on the table. He came in at the same time I did. When I walked into the other room he was standing there looking at the pictures on the wall. I did not see him tamper with my purse. The doctor and I walked out into another room.

After we left the veterinary we drove to Dearborn Street. The dog was on my lap. I missed my sun glasses and I asked him to go back, but he kept on driving. He wouldn't go back. He said "Okeh, but do you have to have them?" I said, "Yes, I would. I would like to have them. I don't want to lose them," but he kept on going.

My little dog started to throw up and he said "Oh, gosh, don't let her throw up on this car. My friend will be angry if she throws up on the car." Then I got back in the back seat and got my dog back in my lap. I says, "well, then you had better stop," and he said, "Okeh, I will," and he stopped. I opened the door and put my dog on the ground and she ran up the street. I followed her. He got out of the car and I said "where are you going?" and he said, "Oh, around the corner. I will be right back." When I got back Mar was sitting in the car. His door was closed. I got in, still holding the dog. He had just started the motor and waited a little. He went like this with the wheel, and then Mr. Van Trell drove up along side of us.

(Testimony of Mabel Helen Lowery.)

He never gave me a jar. I never put anything in my purse. I was paying no attention to anything but the dog. I was trying to wipe it off with my handkerchief, and he said, "Don't let her get anything on my friend's car." I never saw the jar. Mr. Hyde said "Give me your pocketbook," so I handed him my purse. He looked in it and then handed it back to me. Later, when we got in the car, they put me in the back seat with [20] my dog. Mr. Van Trell said, "Did you find anything in her purse?" and Mr. Hyde said "No." So he says, "where is her pocket book?" and he says, "I gave it back to her." So then Mr. Van Treel turned to me and said, "Give me your purse, Mabel," so I handed him my pocket book. After he looked in my purse he handed it back to me and then he went to the car and then he came out with a jar. They took me back to the veterinary for my glasses. Later Mr. Bangs told Mr. Van Treel to stop at the lot. When he got out he said "I want to get out and see if there is any more back there." He went around back of this little shed, and pretty soon he came back and said, "No, there wasn't anything there." Then we went to the veterinary.

When they first took me to the Federal Court House Mr. Hyde took me off to the right in a smaller room, and set my pocket book down on the desk and told me to sit down. Then he went out of the room. When we were walking from the car I said "I have a couple of letters in my purse. I

(Testimony of Mabel Helen Lowery.)

wonder if I could have them.” “I don’t want them to read.” He said “No.”

Afterwards Mr. Van Treel was very nice to me. He gave me a towel and took me into a little wash room there and let me wash my shoulder of my jacket and my slacks off. That was after they found this in my purse. When Hyde gave the purse back there was nobody in the room for about five minutes, but I didn’t touch the purse. I did not know there was anything there.

Cross Examination

I have used the name May Marshall. I have been arrested several times. I would say four or five times. It would be more. I can’t say. I didn’t go to Vancouver last summer. I didn’t bring Duke Browning’s horses down. A trainer brought them down. The trainer went up after them. A friend sent him. I was in Idaho then. I didn’t go to Los Angeles. I went over to Wallace, Idaho, the first of June and came back maybe in July. Then I probably came back in August, and then I came back [21] up in September, and I haven’t been back since.

Harry Mar called me up on September 9th and I said “yes.” He said “Well, I don’t know if I can come out and get you or not, but I am going to try. I have got a friend’s car.” And I said, “Well. I sure wish you would,” and I kept having to ask him over again, because the line was so indistinct. I did not say that I wanted it and needed it. He

(Testimony of Mabel Helen Lowery.)

might have said "I have got it," referring to the car.

I left my purse alone in the office of the doctor. I had about \$132 or \$133. None of it was for the purchase of this opium. I usually carry that much money with me. There was nobody in the doctor's office but Harry Mar, the doctor and myself, so I left my purse there. The doctor and I walked into the back room and I stood at the screen door looking out into the back yard, while the doctor was preparing the medicine, and when we walked back in there, Harry Mar had come from the reception room. The dog was in my arms.

I asked Harry Mar to stop the car just before we came to 8th and Weller. I had asked him about a block or two ahead to stop. The car had not moved away from the curb when the officers made the arrest. At the time I thought it might be down a block or two, but afterwards I have been back and looked there. I had never seen this jar at any time prior to my arrest. It was never in my purse. I did not ask for my powder puff, just the letters. Mr. Hyde did leave me alone with my purse.

I have smoked opium on 28th Avenue. I have never at the Albany Hotel.

Defendant rests.

Rebuttal

A. M. BANGS

recalled as a witness in Rebuttal, testified as follows: [22]

When we drove the defendant Lowery back to the veterinary's we did not stop at 8th and Weller.

GEORGE S. HYDE

recalled as a witness in rebuttal, testified as follows:

Mrs. Lowery was not left alone with her purse at any time. When we drove Mrs. Lowery back to the Veterinary's for her glasses we did not drive by 8th and Weller or stop there.

Witness excused.

Government rests.

Mr. Agnew: Pardon me, your Honor. I neglected to make the formal motions that I made at the end of the Plaintiff's case, and I think that I should protect the record. I am sorry. I would like to make them now, and if your Honor will have the same ruling in mind——

The Court: The Court has the same ruling in mind, and the motions are deemed to have been made at the close of all the evidence, denied, and exception noted and allowed.

Mr. Agnew: Yes, your Honor.

(Whereupon, counsel made their arguments

to the Jury, the Court instructed the jury, whereupon the jury retired to consider their verdict.)

Received a copy of the within Bill of Exceptions this 16th day of Feb., 1945.

J. CHARLES DENNIS

Attorney for U. S.

The foregoing constitutes a full, true and complete Bill of Exceptions insofar as the matters on appeal are concerned and we hereby consent that the trial judge may certify the same as a sufficient Bill of Exceptions in this case.

ALLAN POMEROY

Atty. for Plaintiff

JOHN T. POMEROY

Atty. for Deft. [23]

United States of America

State of Washington

County of King—ss.

I, John C. Bowen, Judge of the United States District Court for the Western District of Washington, Northern Division, and the Judge before whom this cause was tried, do hereby certify:

That the within and foregoing Bill of Exceptions contains all the testimony produced by the Government concerning Counts 3, 4, and 5 of the indictment.

I do further certify that the foregoing Bill of Exceptions, together with the exhibits referred to therein, to wit: Exhibits 1 to 5 inclusive, and the Clerk's record herein constitute all the material

facts, matters and proceedings concerning Counts 3, 4 and 5, and do further constitute all the material facts, matters and proceedings concerning the Assignment of Error filed by Appellant in this cause.

The Clerk of the Court is hereby directed to transmit, and as a part of said Bill of Exceptions Exhibits 1 to 5 inclusive.

Proper notice having been given, I have signed this certificate this 19th day of February, 1945.

JOHN C. BOWEN

Judge

Certificate and Bill of Exceptions Presented by

JOHN F. MATTHEW

Of Attorneys for Defendant

Bill of Exceptions examined and approved:

ALLAN POMEROY

Assistant United States District Attorney.

[Endorsed: Filed Feb. 19, 1945.]

[Title of District Court and Cause.]

ASSIGNMENT OF ERROR

Comes now the defendant (appellant) and makes the following assignment of error:

I: The court erred in denying the challenge to the sufficiency of the evidence and motion for a directed verdict made at the conclusion of the government's case, and at the end of all evidence as to

counts 3, 4, and 5. (Bill of Exceptions pages 18 and 23.)

HENRY CLAY AGNEW

Attorney for Defendant

(Appellant)

Receiver a copy of the within Assignments of Error this 16th day of Feb., 1945.

J. CHARLES DENNIS

Attorney for U. S.

[Endorsed]: Filed Feb. 19, 1945.

[Endorsed]: No. 10965. United States Circuit Court of Appeals for the Ninth Circuit. Mabel Helen Lowery, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed March 2, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10965

MABEL HELEN LOWERY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS AND
DESIGNATION OF RECORD

Comes now the appellant and adopts the assignment of error as a statement of the points to be relied upon on appeal.

Appellant further hereby designates the entire certified transcript for printing.

HENRY CLAY AGNEW

Attorney for Appellant

[Endorsed]: Filed March 12, 1945. Paul P. O'Brien, Clerk.

No. 10965

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MABEL HELEN LOWERY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN
DISTRICT OF WASHINGTON
NORTHERN DIVISION

Brief of Appellant

HENRY CLAY AGNEW,
Counsel for Appellant.

30th Floor Smith Tower,
Seattle 4, Washington.

FILED

MAY 21 1945

No. 10965

United States
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UPON APPEAL FROM THE DISTRICT COURT OF THE
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Brief of Appellant

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No. 10965

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MABEL HELEN LOWERY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN
DISTRICT OF WASHINGTON
NORTHERN DIVISION

Brief of Appellant

STATEMENT OF THE CASE

This is an appeal from a judgment of conviction and sentence to imprisonment entered in the United States District Court for the Western District of Washington, Northern Division (Tr. p. 10).

FACTS OF THE CASE

Appellant was indicted in five counts. Counts I and II charged sale of certain Smoking Opium. Counts III and IV charged possession. Count V charged concealment, possession and transportation in violation of the Act of February 9, 1909 (St. p. 2-6).

Appellant was convicted of Count IV only and was sentenced to serve a term of eighteen months in the Federal Reformatory for women at Alderson, West Virginia (St. 10-11).

Appellant gave notice of appeal (St. 11). The judgment and sentence was dated January 3, 1945, and the notice of appeal was given the same day (St. p. 12). Prior to sentence defendant's motion for new trial and motion in arrest of judgment were denied (St. p. 8-9). The bill of exceptions was regularly certified on the 19th day of February, 1945 (St. p. 67).

STATEMENT OF JURISDICTION

This court has jurisdiction of any appeal from a final judgment in a criminal case by virtue of the rules of procedure of the Supreme Court of the United States authorized by the Act of Congress approved March 8, 1934.

O'Brien Federal App. Procedure, 3rd Edition, p. 89.

ASSIGNMENT OF ERROR (St. 47)

The error assigned and relied upon by this appeal is:

"1: The court erred in denying the challenge to the sufficiency of the evidence and motion for a directed verdict made at the conclusion of the government's case, and at the end of all evidence as to counts 3, 4 and 5."

QUESTION INVOLVED

If the evidence shows that a defendant is addicted to the use of narcotics and has been arrested under facts proving as a matter of law that Federal Officers had illegally entrapped the addict into committing an offense, can such addict then be convicted because of a small quantity of narcotic drug taken from her purse at the time of such illegal arrest?

STATEMENT OF FACTS INVOLVED

The evidence in this case shows that on May 5, 1944, certain Federal officers, charged with the duty of enforcing the laws against traffic in narcotics, without payment of proper tax, arrested a Chinese whose name was Mar Gin Wing (St. 18). This Chinese was at the time unlawfully in possession of a jar of smoking opium. He was taken to the Federal Court House in the City of Seattle and immediately before entry to the building was searched and the opium found (St. 19). After this search and seizure of the narcotics defendant was questioned. He was held on the third floor of the Federal Court House which happened to be the offices of the Narcotics Division. He claimed to the officers that he had previously had an understanding with one of his customers, Mabel Lowery, in which he agreed to sell her narcotics (St. 18-29). The officers then loaned him a government automobile and gave him the narcotics for the purpose of seeing if he could persuade the appellant to purchase. The witness testified that he knew and told the officers that Mabel Lowery was addicted to the use of smoking opium. He testified he had been selling narcotics for two years (St. 21). The Supervisor of the Narcotics Division testified that he knew Mabel Lowery was an addict but that at the last time he saw her "she looked to me like she might be at least temporarily abstaining" (St. 29). He also testified that he was in charge of the office and approved the arrangement whereby seized narcotics were sent in a Federal automobile for the purpose of trying to persuade an addict to purchase them in order to make the arrest (St. 29). All the other narcotic officers also testified to the same situation. Appellant was charged in Counts 3 and 5 (St. 4-5) with offenses growing out of this purchase.

The evidence showed that the Federal officers stopped the automobile with the Chinese and the appellant both in the front seat and found the narcotics upon the front seat of the automobile. The Chinese witness testified that he had not completed the sale and had not been paid for the narcotics at the time of the arrest (St. 20).

The appellant was in this position before the lower court: Unless the lower court ruled, *as a matter of law*, that appellant's arrest was entrapment then there were no grounds for challenging the legality of the search of her purse. The appellant was convicted *only* of Count 4. As to Count 4, the Government succeeded in the search of appellant's pocketbook in finding a minute quantity (sufficient to analyze) of smoking opium. Appellant at the end of the government case requested the court to direct a verdict as to Counts 3 and 5 on the ground that the evidence showed entrapment *as a matter of law* (St. 38-45). Appellant also challenged the sufficiency of the evidence as to all counts both at the end of the government case and at the end of the entire case (St. 45). Appellant moved in arrest of judgment and for a new trial on the grounds that the evidence affirmatively showed an illegal arrest and that appellant had been prevented from moving to suppress the evidence by the court's erroneous ruling that entrapment was a question for the jury and not one to be decided by the court as a matter of law (St. 9).

ARGUMENT

In order for the appellant to be successful in this appeal Your Honors must be convinced that the situation here amounts to entrapment as a matter of law. In other words, the trial court must have been in error in holding that it was a question for the jury.

Unless Your Honors are so convinced there is no use of the appellant urging any other question.

The situation in this case is without any definite precedent. The writer has been unable to find any entrapment case where the government took seized narcotics from the Federal Building and attempted to peddle them in a Federal car to a known addict!!! Appellant contends *that it is the duty of the Federal Narcotic Officers to protect the addict against his own weakness.*

Your Honors will find most of the leading cases on entrapment in the annotation 66 A.L.R. at p. 500. Also see 18 A.L.R. 178. In all of these cases the government was seeking to apprehend a *peddler* and used an *addict* for the purpose of trying to catch peddler. These cases have all laid down the doctrine that if a criminal idea *originates in the defendant's own mind* that then the acts of the Federal officers seeking to obtain evidence against such a defendant would not be entrapment. This seems to be the test generally laid down. If Your Honors wish to apply *that* test to the facts of *this* case then this appellant is out of court and the judgment should be affirmed. However, we submit to Your Honors that *every* narcotic addict will take narcotics if they are solicited to do so. If this procedure is legal there will be no difficulty to convict every addict. The addict is a sick person and incapable of resisting this temptation. This fact is a medically known fact that has been recognized by all decisions. If we can take *seized* narcotics *from a Federal Building* and offer them to an addict and then convict such a sick person for yielding to the temptation placed in his way *by the government* then the judgment in this case should be affirmed and the procedure definitely legalized!

Possibly it is a good idea to lock every narcotic addict up. This procedure sets up a new and absolutely sure method of doing so. No addict will ever turn down a chance to purchase! True, sometimes the addict might be temporarily out of funds. This should make very little difference because the Narcotic Inspector can take a promissory note and the addict will still be equally guilty. The government will not be out anything on such a transaction even if the note cannot be collected because they will immediately seize the narcotics back and send it out to tempt another addict to make a purchase.

The government may with some force urge in this case that if the uncorroborated testimony of the Chinese is true there had been a previous negotiation and that therefore the government was just cooperating in seeing that such negotiation was not interrupted. There is some evidence from which this might be found although the writer believes it is incredible if a careful examination is given to the entire record.

However, conceding that this fact is true for the purpose of this argument, the appellant submits that upon the *arrest* of the Chinese and the *seizure* of the narcotics by the Federal officers and their deposit in the Federal Building in Seattle that *then, if* there had been any conspiracy, such conspiracy was *terminated*. Anything from then on was a new conspiracy instigated and promoted by the Federal officers carried out by the use of a Federal automobile. Let us suppose a narcotic addict had conspired to get some narcotics to satisfy his or her craving. Let us suppose that this failed because of the arrest of the peddler. This being the case, does it justify the Federal officers in sending seized narcotics out of the Court House and endeavoring to tempt an addict into a purchase? The appellant

considers that any evidence of a previous attempt to purchase is immaterial. Every addict would purchase if he could!

In considering this evidence some thought might be given to the fact that this is a pure revenue measure. The Federal Government has no right to regulate public morals. Any crime of the appellant would consist of not placing the proper stamp tax on the narcotics about to be purchased. The fact that the narcotics were not placed in a tax paid package in this particular case seems to the writer to be somewhat the fault of the Federal officers. They, above all, should be careful to not defraud the government. If they were taking seized narcotics out of the Court House to put in commerce it was their duty to pay the two or three cents necessary and to affix the stamps to the package before it left the Court House.

The case of *U. S. vs. Phelps*, 16 Philippine 440, is the only case even partially in point. In this case the appellant had been convicted of possession of smoking opium. He had been persuaded to smoke the opium and was furnished with the opium by a government informer. The appellate court held as a matter of law that the conviction could not stand by reason of the fact that it was entrapment.

Appellant believes that the record was properly protected under all the peculiar circumstances of this case. If Your Honors disagree we call your attention to the case of *Paine et al vs. U. S.* (C.C.A. 9) 7 Fed. (2nd) 263. Under the doctrine of this case any manifest error that appears affirmatively from the record justifies a reversal even though proper motions were not made at exactly the correct time. Here it affirmatively appears that this arrest was illegal as a matter of law; that if the court had so held then appellant

would have been able to suppress the evidence as to the count of which she was convicted. Appellant believes that the record shows that her fundamental rights as a citizen were violated by this arrest and by the subsequent search and seizure; that the record shows no legally obtained evidence upon which she should be convicted.

The writer believes that almost any steps are justifiable for the purpose of putting a narcotic *peddler* out of business. On the other hand also any steps are justified in trying to protect a narcotic addict from his own weakness. The writer believes that Your Honors should treat this case as an opportunity to establish a precedent that the United States Government frowns upon a policy of tempting an addict to purchase narcotics put in circulation by the Federal officers themselves.

Respectfully submitted,

HENRY CLAY AGNEW,
Counsel for Appellant.

No. 10965

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MABEL HELEN LOWERY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

J. CHARLES DENNIS

United States Attorney

ALLAN POMEROY

Assistant United States Attorney
Attorneys for Appellee

FILED

JUN 16 1945

OFFICE AND POST OFFICE ADDRESS:
1017 UNITED STATES COURT HOUSE
SEATTLE, WASHINGTON

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No. 10965

IN THE
United States
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MABEL HELEN LOWERY,

Appellant,

vs.

UNITED STATES OF AMERICA,

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UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

STATEMENT OF THE CASE

The defendant was indicted in five counts of the indictment. The first two counts accused the defendant of selling opium prepared for smoking not in or from the original stamped package. The defendant was acquitted as to these two counts, the only testimony as to the sale being from a confessed prosti-

tute and narcotic addict, and the time of sale being somewhat remote from the time alleged in the other counts in the indictment.

Count III accused the defendant with a purchase of 400 grains of opium not in the original stamped package, and Count V accused the defendant of receiving 410 grains of opium after importation, contrary to law. The defendant was acquitted as to Counts I, II, III and V.

Count IV accused the defendant of purchasing 10 grains of opium, prepared for smoking, not in the original stamped package. The jury returned a verdict of guilty as to Count IV. A motion for a new trial and a motion in arrest of judgment were duly made (Tr. 8 and 9) and denied by the Court. Judgment and sentence was entered and the defendant was sentenced to eighteen months in the Federal Reformatory for Women at Alderson, West Virginia, on Count IV of the indictment (Tr. 11). From this judgment and sentence this appeal is prosecuted.

STATEMENT OF FACTS INVOLVED

The evidence in this case shows that on May 5, 1944 certain Federal Narcotic Agents arrested a Chinese named Mar Gim Wing. He was taken to the Federal Narcotic Office at the United States Court

House in the city of Seattle. Before entering the United States Court House Building the defendant gave the officers a 50 fun jar of opium (Tr. 19) which Mar took from his pocket. While under questioning Mar Gim Wing told the officers that he was making a delivery of opium to the defendant, Mabel Lowery. The officers then allowed Mar Gim Wing, at Mar's own suggestion, to go through with his arrangements of delivering the jar of opium to Mabel Lowery. There was some discussion between the officers and Mar as to the method of delivering the opium. However, the evidence shows that most of the suggestions as to the delivery were made by Mar (Tr. 23, 27), the officers desiring to witness the delivery, which had been previously arranged between Mar Gim Wing and the defendant Mabel Lowery. Mar used a car given to him by the Narcotic Agents for the purpose of making the delivery of the opium to Mabel Lowery. When arrested Mabel Lowery was in the above mentioned automobile which Mar was driving. The evidence as to the completeness of the delivery of the 50 fun jar of opium was very much in conflict (Tr. 24, 27, 31, 36, 42).

Upon search of the purse of the defendant, Mabel Lowery, the opium mentioned in Count IV of the indictment was found in a powder puff bag.

QUESTION PRESENTED

The appellant states the question presented to be "if the evidence shows that a defendant is addicted to the use of narcotics and has been arrested under facts proving as a matter of law that Federal Officers had illegally entrapped the addict into committing an offense, can such addict then be convicted because of a small quantity of narcotic drugs taken from her purse at the time of such illegal arrest?" The appellee does not agree that this is the question presented. However, since that is the only question raised by the appellant, that is the question which will be discussed in this brief.

ARGUMENT

The first sentence of the appellant's brief states "In order for the appellant to be successful in this appeal, Your Honors must be convinced that the situation here amounts to entrapment as a matter of law." (Appellant's Brief, Page 4). Further, in the argument of appellant, Brief, Page 5, it is stated that the test laid down is that if a criminal idea originates in the defendant's own mind, then the acts of the Federal Officers seeking to obtain evidence against such a defendant would not be entrapment. It is the evidence as shown in the transcript and in the state-

ment of facts herein that there had been a preconceived and prearranged plan between Mar Gim Wing, the Chinese, and the defendant, Mabel Lowery, to violate the law, and that the Federal Officers did nothing but permit the prearranged plan to continue until such time as the defendant, Mabel Lowery, became a law violator, and this only as to the 50 fun jar which was the opium mentioned in Counts III and V of the indictment. The opium mentioned in Count IV of the indictment, which is the only count to which the jury returned a verdict of guilty, had no part of the prearranged plan between Mar Gim Wing and the defendant, Mabel Lowery, and in which the appellant claims entrapment. The defendant obtained the benefit of any claim of entrapment by the instruction on entrapment given by the trial judge. The said instruction on entrapment gave the full benefit of any such claim to the defendant and there is no one now to state whether or not it was this instruction or the conflict in the evidence regarding delivery of the opium or what reason caused the jury to bring in a verdict of not guilty as to Counts III and V.

The 10 grains of opium mentioned in Count IV of the indictment and which are testified to (Tr. 18) as 8 grains of opium by the Government chemists,

were never part of the prearranged plan and since there is no conflicting testimony must have been in the defendant, Mabel Lowery's possession at all times and until found by the Narcotics Officers.

There never was a motion to suppress Exhibit 4 of the evidence, and even if well taken, which fact is denied, comes too late. (*Clark vs. United States*, 245 Fed., 112; *Alvarado vs. United States*, 9 Fed. (2d) 385).

The whole argument of appellant seems to be that no user of narcotics should be offered narcotics, and because of the users' weakness in accepting said narcotics there should be no conviction. This argument is not properly a part of the present case since the part of the indictment which alleged narcotics which had been in Government custody is not a part of this appeal.

Count IV of the indictment, which is the only part of the indictment subject to review here, mentions only narcotics which had no part of the transaction involving the handling of narcotics by Federal Officers.

The appellant's brief, page 8, states that "the writer believes that almost any steps are justifiable for the purpose of putting a narcotic peddler out of

business.” It is to be noted here that the first two counts of the indictment, on each of which a verdict of not guilty was returned, charged the defendant, Mabel Lowery, with the sale of opium. There was no error in failure to sustain the defendant’s challenge to the legal sufficiency of the evidence and the defendant then proceeded to introduce evidence on behalf of the defendant. (*Clark vs. United States*, 245 Fed., 112.)

One who has not engaged in, and had not recently been engaged in, violating the law, and who had no present intention of violating it, may not, through *sympathetic* appeals, or other *impelling* machinations of officers or so-called stool pigeons, be induced to commit a crime, and then be prosecuted and convicted for committing it. (*Cain vs. U. S.*, 19, Fed. (2d) 472).

In the case at bar, there was no stool pigeon, there was another defendant, Mar, who later pleaded guilty (Tr. 18), who was permitted at his own suggestion to go through with a preconceived and prearranged deal in opium with the defendant Mabel Lowery. Thus came the instruction on entrapment to the jury. (*DiSalvo vs. United States*, 2 Fed. (2d) 222; *Cermack vs. United States*, 4 Fed. (2d), 99).

This instruction was given over the objection of

the Government and a verdict of not guilty was returned as to Counts III and V.

Even where facilities for commission of a crime are placed in the way of one suspected of a willingness to commit it, such facilitating or affording an opportunity to commit a crime is not a defense to the perpetrator of it.

Aultman vs. United States, 289 Fed. 251;
United States vs. Poppagoda, 288 Fed. 214.

There is no entrapment where there is no persuasion or coaxing.

Sauvain vs. United States, 31 Fed. (2d), 732.

Now, having received the benefit of the instruction and only being convicted on Count IV involving 10 grains of opium found in a powder puff bag, the defendant now asks that this evidence be suppressed, no such motion having been made at any time heretofore. Without conceding the merit of such motive, the raising of such a question on appeal is untimely. The case cited by defendant is not in point with this case.

Paine, et al, vs. United States, 7 Fed. (2d), 263.

There has been no miscarriage of justice in this case and the evidence in the Court receiving the ver-

dict of guilty was not put in circulation by Narcotic Officers.

CONCLUSION

It is respectfully submitted that the trial court acted correctly in denying the challenge to the legal sufficiency of the evidence and motion for a directed verdict made at the conclusion of the Government's case and at the end of all evidence as to Counts III, IV and V. Therefore the judgment should be affirmed.

J. CHARLES DENNIS
United States Attorney

ALLAN POMEROY
*Assistant United States Attorney
Attorneys for Appelle.*

No. 10967

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM MORRIS,

Appellant.

vs.

UNITED STATES OF AMERICA,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

MAY 16 1945

PAUL P. O'BRIEN!
CLERK

No. 10967

IN THE

United States Circuit Court of Appeals
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United States Attorney

ERNEST A. TOLIN

Assistant U. S. Attorney

600 U. S. Post Office and Court House Building

Los Angeles 12, California [1*]

In the District Court of the United States
Southern District of California
Central Division

No. 17242

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM MORRIS,

Defendant.

INFORMATION

Comes now Charles H. Carr, United States Attorney in and for the Southern District of California, Central Division, who for the United States and in its behalf, prosecutes in his own proper person, and with leave of Court first had and obtained, gives the Court here to understand and be informed as follows, to-wit: [2]

COUNT ONE

That on or about the 27th day of October 1943, in the City of Los Angeles, County of Los Angeles, State of California, in the district aforesaid and in the central division thereof, and within the jurisdiction of this Court, the defendant William Morris violated the provisions of the Emergency Price Control Act of 1942 as amended, in that he did knowingly, wilfully and unlawfully make an entry false in a material respect, in Morris Bros. Fruit Co.'s copy of a statement showing the sale to Aldrich & Company, 14 South Water Market, Chicago, Illinois, of five hundred and eighty-two (582) boxes of oranges for the price of Four Dollars and Fifty cents (\$4.50) per box, or a total sum of Two Thousand Six Hundred and Nineteen Dollars (\$2619.00), whereas the

actual price charged for the sale of said oranges at said time and place was an average of Five Dollars and Fifty cents (\$5.50) per box, or a total sum of Three Thousand Two Hundred and One Dollars (\$3201.00), which fact as to the price charged for said sale of said oranges was known to the defendant at the time of said entry, and said entry was false at the time of making said record, and said record was a document required to be kept under the provisions of Section 1351.1405(g) of Maximum Price Regulation 292, as amended, (8 Fed. Reg. 135 and 8 Fed. Reg. 543) which was promulgated pursuant to the provisions of Section 202 of the Emergency Price Control Act of 1942, as amended; in violation of Section 205 (b) of the Emergency Price Control Act, as amended, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942). [3]

COUNT TWO

That on or about the 27th day of October 1943, in the City of Los Angeles, County of Los Angeles, State of California, in the district aforesaid and in the central division thereof, and within the jurisdiction of this Court, the defendant William Morris violated the provisions of the Emergency Price Control Act of 1942 as amended, in that he did knowingly, wilfully and unlawfully make an entry false in a material respect, in Morris Bros. Fruit Co.'s copy of a statement showing the sale to Aldrich & Company, 14 South Water Market, Chicago, Illinois, of five hundred and eighty-two (582) boxes of oranges for the price of Four Dollars and Fifty cents (\$4.50) per box, or a total sum of Two

Thousand Six Hundred and Nineteen Dollars (\$2619.00), whereas the actual price charged for the sale of said oranges at said time and place was an average of Five Dollars and Fifty cents (\$5.50) per box, or a total sum of Three Thousand Two Hundred and One Dollars (\$3201.00), which fact as to the price charged for said sale of said oranges was known to the defendant at the time of said entry, and said entry was false at the time of making said record, and said record was a document required to be kept under the provisions of Section 1351.1405(g) of Maximum Price Regulation 292, as amended, (8 Fed. Reg. 135 and 8 Fed. Reg. 543) which was promulgated pursuant to the provisions of Section 202 of the Emergency Price Control Act of 1942, as amended; in violation of Section 205 (b) of the Emergency Price Control Act, as amended, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942). [4]

COUNT THREE

I.

Louis Morris, William Morris and Andrew Morris, co-partners, doing business as Morris Bros. Fruit Co., at all times herein mentioned were intermediate sellers, classified as cash-and-carry wholesalers as defined in Section 1351.1405 of Maximum Price Regulation 292, as amended (8 Fed. Reg. 135 and 8 Fed. Reg. 343).

II.

On or about the 27th day of October 1943, in the City of Los Angeles, County of Los Angeles, State of

California, in the district and division aforesaid and within the jurisdiction of this Court, defendant William Morris, acting as an employee, agent and co-partner of said Morris Bros. Fruit Co., a co-partnership, violated the provisions of the Emergency Price Control Act of 1942, as amended, in that he did knowingly, wilfully and unlawfully agree to sell, offer to sell and did sell to Aldrich & Company, 14 South Water Market, Chicago, Illinois, a carload of oranges, consisting of five hundred and eighty-two (582) boxes of packed wrapped oranges, cash-and-carry Los Angeles, California, for the sum of Three Thousand Two Hundred and One Dollars (\$3201.00), or an average price per box of Five Dollars and Fifty cents (\$5.50); that the maximum price permitted in Maximum Price Regulation 292, as amended, (8 Fed. Reg. 135, 8 Fed. Reg. 2869 and 8 Fed. Reg. 6134) for said sale of said packed wrapped oranges, was Four Dollars and Forty-nine Cents (\$4.49) per box, or a total sum of Two Thousand Six Hundred and Thirteen Dollars and Eighteen Cents (\$2613.18) which was the maximum price permitted for said sale of said carload of said oranges: in violation of Section 1351.1401 of said Maximum Price Regulation 292, as amended, issued pursuant to the provisions of the Emergency Price Control Act of 1942, as amended, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942). [5]

COUNT FOUR

I.

Louis Morris, William Morris and Andrew Morris, co-partners, doing business as Morris Bros. Fruit Co., at all times herein mentioned were intermediate sellers, classified as cash-and-carry wholesalers as defined in Section 1351.1405 of Maximum Price Regulation 292, as amended (8 Fed. Reg. 135 and 8 Fed. Reg. 343).

II.

On or about the 27th day of October 1943, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid and within the jurisdiction of this Court, defendant William Morris, acting as an employee, agent and co-partner of said Morris Bros. Fruit Co., a co-partnership, violated the provisions of the Emergency Price Control Act of 1942, as amended, in that he did knowingly, wilfully and unlawfully agree to sell, offer to sell and did sell to Aldrich & Company, 14 South Water Market, Chicago, Illinois, a carload of oranges, consisting of five hundred and eighty-two (582) boxes of packed wrapped oranges, cash-and-carry Los Angeles, California, for the sum of Three Thousand Two Hundred and One Dollars (\$3201.00), or an average price per box of Five Dollars and Fifty Cents (\$5.50); that the maximum price permitted in Maximum Price Regulation 292, as amended, (8 Fed. Reg. 135, 8 Fed. Reg. 2869 and 8 Fed. Reg. 6134) for said sale of said packed wrapped oranges, was Four Dollars and Forty-nine Cents (\$4.49) per box, or a total

sum of Two Thousand Six Hundred and Thirteen Dollars and Eighteen Cents (\$2613.18) which was the maximum price permitted for said sale of said carload of said oranges; in violation of Section 1351.1401 of said Maximum Price Regulation 292, as amended, issued pursuant to the provisions of the Emergency Price Control Act of 1942, as amended, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942). [6]

Wherefore, said United States Attorney prays that process of this Court be issued against said defendant and that he be dealt with according to law.

CHARLES H. CARR

United States Attorney

By Ernest A. Tolin

Assistant United States Attorney [7]

[Verified.]

[Endorsed]: Filed Oct. 5, 1944. [8]

At a stated term, to-wit: The September Term, A. D. 1944, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 5th day of October in the year of our Lord one thousand nine hundred and forty-four.

Present:

The Honorable Ben Harrison, District Judge.

No. 17,242-Crim.

United States of America

vs.

William Morris

On motion of E. A. Tolin, Esq., Assistant U. S. Attorney, appearing for the Government, who presents an Information to the Court in this cause, it is ordered that the said Information be filed and no bond is fixed. [9]

[Title of District Court and Cause.]

DEMURRER TO INFORMATION

Comes now defendant above named, through his counsel, E. O. Leake, and demurring to the information for cause of demurrer states:

I.

That said information fails to state facts sufficient to constitute a criminal offense.

II.

That count 1 of said information fails to state facts sufficient to constitute a criminal offense.

III.

That count 2 of said information fails to state facts sufficient to constitute a criminal offense.

IV.

That count 3 of said information fails to state facts sufficient to constitute a criminal offense. [10]

V.

That count 4 of said information fails to state facts sufficient to constitute a criminal offense.

Defendant will rely upon the points and authorities served and filed in support of motion to quash and set aside amended information and of the demurrer in the case of *United States vs. James Choumas*, No. 16945 of the records and files of the above-entitled court.

Dated: This 13th day of October, 1944.

Respectfully submitted,

E. O. LEAKE & J. J. LEAKE

By E. O. Leake

Attorneys for Defendant [11]

Received copy of within Demurrer October 16, 1944.
Charles H. Carr, United States Atty., by Mary Wentworth.

[Endorsed]: Filed Oct. 16, 1944. [12]

[Title of District Court and Cause.]

NOTICE OF MOTION TO QUASH AND SET
ASIDE INFORMATION AND ON DEMURRER

To the Plaintiff Above Named and to Charles H. Carr,
Esq., United States Attorney:

You and Each of You will please take notice that defendant, William Morris, will on Monday, the 16th day of October, 1944, before the Honorable Ben Harrison, United States District Court Judge, in Room 6 of the Federal Building, Los Angeles, California, move the above-entitled court to quash and set aside the information herein.

Said motion will be made upon the ground that the said information and each count thereof fails to state facts sufficient to constitute a criminal offense; that the laws, rules and regulations upon which said information purports to be based are arbitrary, discriminatory, unreasonable, invalid, unconstitutional and void; that the United States Attorney in and for the Southern District of California, Central Division has not been authorized [13] to institute the above-entitled action by the Secretary of Agriculture, and that the Secretary of Agriculture did not and has not prior to the commencement of the above proceedings at any time approved the institution of the above-entitled action. That it does not appear that the maximum price alleged is in conformity with the rules and regulations of the Secretary of Agriculture, or with the provisions of the Agricultural Marketing Agreement Act of 1937, as amended.

That counts 1 and 2 of said information are indefinite and uncertain in that it cannot be ascertained therefrom how or in what manner the facts therein alleged were in

violation of Section 1351.1405(g) of the Maximum Price Regulation 292, as amended, or were in violation of Section 205(b) of the Emergency Price Control Act, as amended.

That counts 3 and 4 of said information are uncertain and indefinite in that it cannot be ascertained therefrom how or in what manner or by what method the alleged maximum prices therein set forth were determined.

It cannot be ascertained from said information herein whether or not count 2 is a duplicate count 1 or intends to charge a separate offense.

That it cannot be ascertained from said information whether or not count 4 is a duplicate of count 3 or intends to allege a separate offense.

Said motion will be based upon this notice of motion, the information herein, and the laws governing the same.

Defendant will reply upon the points and authorities served and filed in support of motion to quash and set aside the amended information and of the demurrer in the case of United States vs. James Choumas, No. 16945, of the records and files of the above-entitled court.

Dated: This 13th day of October, 1944.

E. O. LEAKE & J. J. LEAKE and
MARIO PERELLI-MINETTI

By E. O. Leake

Attorneys for Defendant [14]

Received copy of within notice Oct. 16-44. Charles H. Carr, U. S. Atty., by Mary Wentworth.

[Endorsed]: Filed Oct. 16, 1944. [15]

At a stated term, to-wit: The September Term, A. D. 1944, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 23rd day of October in the year of our Lord one thousand nine hundred and forty-four.

Present:

The Honorable Ben Harrison, District Judge.

No. 17,242-Crim.

United States of America,

Plaintiff,

vs.

William Morris,

Defendant.

This cause coming on for hearing on motion of defendant to quash the information herein; hearing on demurrer to information, and plea of defendant to the information; E. A. Tolin, Esq., Assistant U. S. Attorney, appearing for the Government; E. O. Leake, Esq., appearing for the defendant; Wm. J. Weitzel, Court Reporter, being present and reporting the proceedings; the defendant being present on his own recognizance:

Attorney Tolin makes a statement and asks leave to file an amended information herein. The Court makes a statement. Attorney Leake makes a statement. It is ordered that motion of the Government for leave to file an amended information be, and it is, granted. [16]

[Title of District Court and Cause.]

AMENDED INFORMATION

Comes now Charles H. Carr, United States Attorney in and for the Southern District of California, Central Division, who for the United States and in its behalf, prosecutes in his own proper person, and with leave of Court first had and obtained, gives the Court here to understand and be informed as follows, to-wit: [17]

COUNT ONE

That on or about the 27th day of October 1943, in the City of Los Angeles, County of Los Angeles, State of California, in the district aforesaid and in the central division thereof, and within the jurisdiction of this Court, the defendant William Morris violated the provisions of the Emergency Price Control Act of 1942 as amended, in that he did knowingly, wilfully and unlawfully make an entry false in a material respect, in Morris Bros. Fruit Co.'s copy of a statement showing the sale to Aldrich & Company, 14 South Water Market, Chicago, Illinois, of five hundred and eighty-two (582) boxes of oranges for the price of Four Dollars and Fifty Cents (\$4.50) per box, or a total sum of Two Thousand Six Hundred and Nineteen Dollars (\$2619.00), whereas the actual price charged for the sale of said oranges at said time and place was an average of Five Dollars and Fifty Cents (\$5.50) per box, or a total sum of Three Thousand Two Hundred and One Dollars (\$3201.00), which fact as to the price charged for said sale of said oranges was known to the defendant at the time of said entry, and said entry was false at the time of making said record, and said record was a document required to be kept under the provisions of Section 1351.1405(g) of Maximum Price Regulation

292, as amended, (8 Fed. Reg. 135 and 8 Fed. Reg. 543) which was promulgated pursuant to the provisions of Section 202 of the Emergency Price Control Act of 1942, / which Regulation 292, as amended had been approved by the Secretary of Agriculture [LRY J] as amended; in violation of Section 205(b) of the Emergency Price Control Act, as amended, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942). [18]

COUNT TWO

That on or about the 27th day of October 1943, in the City of Los Angeles, County of Los Angeles, State of California, in the district aforesaid and in the central division thereof, and within the jurisdiction of this Court the defendant William Morris violated the provisions of the Emergency Price Control Act of 1942 as amended, in that he did knowingly, wilfully and unlawfully make an entry false in a material respect, in Morris Bros. Fruit Co.'s copy of a statement showing the sale to Aldrich & Company, 14 South Water Market, Chicago, Illinois, of five hundred and eighty-two (582) boxes of oranges for the price of Four Dollars and Fifty Cents (\$4.50) per box, or a total sum of Two Thousand Six Hundred and Nineteen Dollars (\$2619.00), whereas the actual price charged for the sale of said oranges at said time and place was an average of Five Dollars and Fifty Cents (\$5.50) per box, or a total sum of Three Thousand Two Hundred and One Dollars (\$3201.00), which fact as to the price charged for said sale of said oranges was known to the defendant at the time of said entry, and said entry

was false at the time of making said record, and said record was a document required to be kept under the provisions of Section 1351.1405(g) of Maximum Price Regulation 292, as amended, (8 Fed. Reg. 135 and 8 Fed. Reg. 543) which was promulgated pursuant to the provisions of Section 202 of the Emergency Price Control Act which Regulation 292, as amended had been approved by the Secretary of Agriculture [LRY J] of 1942, / as amended; in violation of Section 205(b) of the Emergency Price Control Act, as amended, being a separate and distinct transaction from that pleaded in Count One of this Information, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942). [19]

COUNT THREE

I.

Louis, Morris, William Morris and Andrew Morris, co-partners, doing business as Morris Bros. Fruit Co., at all times herein mentioned were intermediate sellers, classified as cash-and-carry wholesalers as defined in Section 1351.1405 of Maximum Price Regulation 292, as amended (8 Fed. Reg. 135 and 8 Fed. Reg. 343).

II.

On or about the 27th day of October 1943, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid and within the jurisdiction of this Court, defendant William Morris, acting as an employee, agent and co-partner of said Mor-

ris Bros. Fruit Co., a co-partnership, violated the provisions of the Emergency Price Control Act of 1942, as amended, in that he did knowingly, wilfully and unlawfully agree to sell, offer to sell and did sell to Aldrich & Company, 14 South Water Market, Chicago, Illinois, a carload of oranges, consisting of five hundred and eighty-two (582) boxes of packed wrapped oranges, cash-and-carry Los Angeles, California, at a price higher than the maximum price established by Maximum Price Regulation No. 292, as amended, to-wit: The sum of Three Thousand Two Hundred and One Dollars (\$3201.00), or an average price per box of Five Dollars and Fifty Cents (\$5.50); that the maximum price permitted in Maximum Price Regulation 292, as amended, (8 Fed. Reg. 135, 8 Fed. Reg. 2869 and 8 Fed. Reg. 6134) for said sale of said packed wrapped oranges, was Four Dollars and Forty-nine Cents (\$4.49) per box, or a total sum of Two Thousand Six Hundred and Thirteen Dollars and Eighteen Cents (\$2613.18) which was the maximum price permitted for said sale of said carload of said oranges; in violation of Section 1351.1401 of said Maximum Price

which Regulation 292, as amended had been approved by the Secretary of Agriculture [LRY J] Regulation 292, as amended, / issued pursuant to the provisions of the Emergency Price Control Act of [20] 1942, as amended, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942). [21]

COUNT FOUR

I.

Louis Morris, William Morris and Andrew Morris, co-partners, doing business as Morris Bros. Fruit Co., at all times herein mentioned were intermediate sellers, classified as cash-and-carry wholesalers as defined in Section 1351.1405 of Maximum Price Regulation 292, as amended (8 Fed. Reg. 135 and 8 Fed. Reg. 343).

II.

On or about the 27th day of October 1943, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid and within the jurisdiction of this Court, defendant William Morris, acting as an employee, agent and co-partner of said Morris Bros. Fruit Co., a co-partnership, violated the provisions of the Emergency Price Control Act of 1942, as amended, in that he did knowingly, wilfully and unlawfully agree to sell, offer to sell and did sell to Aldrich & Company, 14 South Water Market, Chicago, Illinois, a carload of oranges, consisting of five hundred and eighty-two (582) boxes of packed wrapped oranges, cash-and-carry Los Angeles, California, at a price higher than the maximum price established by Maximum Price Regulation No. 292, as amended, to-wit: the sum of Three Thousand Two Hundred and One Dollars (\$3201.00), or an average price per box of Five Dollars and Fifty Cents (\$5.50); that the maximum price permitted in Maximum Price Regulation 292, as amended, (8 Fed. Reg. 135, 8 Fed. Reg. 2869 and 8 Fed. Reg. 6134) for said sale of said

packed wrapped oranges, was Four Dollars and Forty-nine Cents (\$4.49) per box, or a total sum of Two Thousand Six Hundred and Thirteen Dollars and Eighteen Cents (\$2613.18) which was the maximum price permitted for said sale of said carload of said oranges; in violation of Section 1351.1401 of said Maximum Price Regulation 292, as amended, issued pursuant to the provisions of the Emergency Price Control Act of 1942, as which Regulation 292, as amended had been approved by the Secretary of Agriculture [LRY J] amended, / being a separate and distinct transaction from that pleaded in Count Three of this [22] Information, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942).

Wherefore, said United States Attorney prays that process of this Court be issued against said defendant and that he be dealt with according to law.

CHARLES H. CARR

United States Attorney

By Charles H. Veale

Assistant United States Attorney [23]

[Verified.]

[Endorsed]: Filed Nov. 1, 1944. [24]

[Title of District Court and Cause.]

NOTICE OF MOTION TO QUASH AND SET
ASIDE AMENDED INFORMATION

To the Plaintiff Above Named and to Charles H. Carr,
Esq., United States Attorney:

You and Each of You will please take notice that defendant William Morris, will on Monday, the 13th day of November, 1944, before the Honorable Ben Harrison, United States District Court Judge, in Room 6 of the Federal Building, Los Angeles, California, move the above-entitled court to quash and set aside the amended information herein.

Said motion will be made upon the ground that the said amended information and each count thereof fails to state facts sufficient to constitute a criminal offense; that the laws, rules and regulations upon which said information purports to be based are arbitrary, discriminatory, unreasonable, invalid, unconstitutional and void; that it does not appear that the United States Attorney in and for the Southern District of California, Central [25] Division has been authorized to institute the above-entitled action by the Secretary of Agriculture, or that the Secretary of Agriculture did prior to the commencement of the above proceedings at any time approve the institution of the above-entitled action. That it does not appear that the maximum price alleged is in conformity with the rules and regulations of the Secretary of Agriculture, or with the provisions of the Agricultural Marketing Agreement Act of 1937, as amended.

That counts 1 and 2 of said amended information are indefinite and uncertain in that it cannot be ascertain

therefrom how or in what manner of the facts therein alleged were in violation of Section 1351.1405(g) of the Maximum Price Regulation 292, as amended, or were in violation of Section 205(b) of the Emergency Price Control Act, as amended.

That counts 3 and 4 of said amended information are uncertain and indefinite in that it cannot be ascertained therefrom how or in what manner or by what method the alleged maximum prices therein set forth were determined.

Said motion will be based upon this notice of motion, the amended information herein, and the laws governing the same.

Defendant will rely upon the points and authorities served and filed in support of motion to quash and set aside the 2nd amended information and of the demurrer in the case of United States vs. James Choumas, No. 16945, of the records and files of the above-entitled court.

Dated: This 8th day of November, 1944.

E. O. LEAKE & J. J. LEAKE and
MARIO PERELLI-MINETTI

By E. O. Leake

Attorneys for Defendant [26]

Received copy of the within Notice of Motion, etc., this 9th day of November, 1944. Charles H. Carr, U. S. Atty., by M. Wentworth.

[Endorsed]: Filed Nov. 9. 1944. [27]

[Title of District Court and Cause.]

DEMURRER TO AMENDED INFORMATION

Comes now defendant above named, through his counsel, E. O. Leake, and demurring to the amended information, for cause of demurrer states:

I.

That said amended information fails to state facts sufficient to constitute a criminal offense.

II.

That count 1 of said amended information fails to state facts sufficient to constitute a criminal offense.

III.

That count 2 of said amended information fails to state facts sufficient to constitute a criminal offense.

IV.

That count 3 of said amended information fails to state facts sufficient to constitute a criminal offense. [28]

V.

That count 4 of said amended information fails to state facts sufficient to constitute a criminal offense.

Defendant will rely upon the points and authorities served and filed in support of motion to quash and set aside the 2nd amended information and of the demurrer thereto in the case of *United States v. James Choumas*, No. 16945 of the records and files of the above-entitled court.

Dated: This 8th day of November, 1944.

E. O. LEAKE & J. J. LEAKE and
MARIO PERELLI-MINETTI

By E. O. Leake

Attorneys for Defendant [29]

Received copy of the within Demurrer to Amended Information this 9th day of November, 1944. Charles H. Carr, U. S. Atty., by M. Wentworth.

[Endorsed]: Filed Nov. 9, 1944. [30]

At a stated term, to-wit: The September Term, A. D. 1944, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 6th day of November in the year of our Lord one thousand nine hundred and forty-four.

Present:

The Honorable Ben Harrison, District Judge.

No. 17,242-Crim.

United States of America,
Plaintiff,

vs.

William Morris,
Defendant.

This cause coming on for arraignment and plea of the defendant William Morris to the amended information herein; Ray H. Kinnison, Esq., Assistant U. S. Attorney, appearing for the Government; E. O. Leake, Esq., appearing for the defendant; Eloise Mellor, Court Reporter, being present and reporting the proceedings; the defendant being absent:

It is ordered that this cause be, and it hereby is, continued to November 13, 1944, at 9:30 A. M., for arraignment and plea. [31]

At a stated term, to-wit: The September Term, A. D. 1944, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 13th day of November in the year of our Lord one thousand nine hundred and forty-four.

Present:

The Honorable Ben Harrison, District Judge.

No. 17,242-Crim.

United States of America,

Plaintiff,

vs.

William Morris,

Defendant.

This cause coming on for (1) hearing motion to quash and set aside Amended Information, (2) demurrer to Amended Information, and (3) plea to Amended Information; E. A. Tolin, Assistant U. S. Attorney, appearing as counsel for the Government; E. O. Leake, Esq., appearing as counsel for the defendant William Morris, who is absent on his own recognizance; and Myrtle Bennallack, Court Reporter, being present and reporting the proceedings:

The Court makes a statement and Attorney Tolin makes a statement. It is ordered that the cause be, and it hereby is, continued to November 27, 1944, at 9:30 A. M., for the said proceedings. [32]

[Title of District Court and Cause.]

WAIVER BY DEFENDANT OF RIGHT TO BE
PRESENT IN COURT

The above-named defendant hereby specifically waives the right to be personally present in court at all court hearings, except the trial of the action, and does hereby consent that he may be represented by his counsel, E. O. Leake, at all of such hearings without the necessity of his being personally present.

Dated: This 6th day of November, 1944.

William Morris

Defendant

E. O. Leake, attorney for the above-named defendant, does hereby approve the foregoing waiver.

Dated: This 6th day of November, 1944.

E. O. Leake

Attorney for Defendant

[Endorsed]: Filed Nov. 21, 1944. [33]

At a stated term, to-wit: The September Term, A. D. 1944, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 27th day of November in the year of our Lord one thousand nine hundred and forty-four.

Present:

The Honorable Ben Harrison, District Judge.

No. 17,242-Crim.

United States of America,

Plaintiff,

vs.

William Morris,

Defendant.

This cause coming on for (1) hearing motion to quash and set aside Amended Information, (2) demurrer to same, and (3) plea of defendant William Morris; E. A. Tolin, Assistant U. S. Attorney, appearing as counsel for the Government; E. O. Leake, Esq., appearing as counsel for the said defendant, who is absent on his own recognizance; and H. P. Fursdon, Court Reporter, being present and reporting the proceedings:

It is ordered that (1) motion to quash and set aside Amended Information be, and it is, denied and exception allowed; and that (2) demurrer to same be, and it is, overruled and exception allowed.

Attorney Leake enters plea of not guilty in behalf of the said defendant to each count of the Amended Information.

It is ordered that the cause be, and it hereby is, set for trial on January 3, 1945, at 10 A. M., before Judge Yankwich. [34]

At a stated term, to-wit: The September Term, A. D. 1944, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 3rd day of January in the year of our Lord one thousand nine hundred and forty-five.

Present:

The Honorable Leon R. Yankwich, District Judge.

No. 17,242-Crim.

United States of America,
Plaintiff,

vs.

William Morris,
Defendant.

This cause coming on for trial on Amended Information; E. A. Tolin, Assistant U. S. Attorney, appearing as counsel for the Government; E. O. Leake, Esq., appearing as counsel for the defendant, William Morris, who is present; and Myrtle Bennallack, Court Reporter, being present and reporting the testimony and the proceedings, and both sides answering ready,

It is ordered that a jury be drawn, whereupon, the clerk draws the names of the following twelve prospective jurors who take seats in the jury box: Edward Heim, F. A. Gross, W. J. Fairchild, W. C. Rockwell, Harbin F. Hunter, Thomas J. McGowan, Nancy Fallis, Arthur G. Wilson, Doyle T. McDaniel, Alfred C. Danz, Walter E. Deutsch, and Will B. Haines. The said jurors are examined by the Court for cause and by Attorneys Tolin

and Leake for cause. The Government passes peremptory challenge.

Nancy Fallis is excused on defendant's peremptory challenge and it is ordered that another name be drawn, whereupon, the clerk draws the name of Helen R. MacRacken who is examined by the Court for cause and by Attorney Leake for cause. The Government passes peremptory challenge.

Will B. Haines is excused by the defendant on second peremptory challenge and it is ordered that another name be drawn, whereupon the clerk draws the name of Howard S. Nourse who is examined by the Court for cause.

There being no further peremptory challenges the jurors now in the box are accepted and sworn as the jury for the trial of this cause, viz.: [35]

THE JURY

- | | |
|----------------------|------------------------|
| 1. Edward Heim | 7. Helen R. MacCracken |
| 2. F. A. Gross | 8. Arthur G. Wilson |
| 3. W. J. Fairchild | 9. Doyle T. McDaniel |
| 4. W. C. Rockwell | 10. Alfred C. Danz |
| 5. Harbin F. Hunter | 11. Walter E. Deutsch |
| 6. Thomas J. McGowan | 12. Howard S. Nourse |

It is ordered that the jurors not impaneled for the trial of this cause be, and they hereby are, excused until January 4, 1945, at 10 A. M.

Attorney Tolin, in behalf of the Government, makes opening statement. Counsel for the defendant waives opening statement. Reading of the Information is waived.

The Court admonishes the jury that during the progress of this trial and the recesses therein they are not to speak

to anyone or permit anyone to speak to them about this cause or any matter or thing therewith connected, that until said cause is finally submitted to them for their deliberation under the instructions of the Court they are not to speak to each other about this cause, or any matter or thing therewith connected, or form or express any opinion concerning the merits of the trial until it is finally submitted to them, and declares a recess for a few minutes.

Court reconvenes and all being present as before including the jury, the defendant and counsel, and the reporter, L. L. Collum is called, sworn, and testifies and Attorney Leake objects to introduction of evidence on grounds that the Information is insufficient.

Counsel stipulate that the jury has been admonished and the jury is excused temporarily, and they retire while counsel discuss the legal question arising from the objection. Objection to introduce testimony is overruled.

Attorney Tolin asks leave to amend the Information and it is so ordered and the Information is amended by interlineation as follows:

As to Count 1, line 23, after "1942" insert "which regulation 292 as amended had been approved by the Secretary of Agriculture;

As to Count 2, line 23, page 4, after the word "Amended";

As to Count 3, line 31, page 5, after the word "Amended";

As to Count 4, line 31, page 7, after the word "Amended";

make the same insertion as after Count 1; and the said changes are initialed by the Court. It is stipulated that

the proceedings hereto- [36] fore had were on the Amended Information as amended.

The jury is called in and all being present as before, including the defendant and counsel, Witness Collum resumes the stand and testifies on direct examination by Attorney Tolin. There is no cross-examination.

F. S. Gunther is called, sworn, and testifies for the Government. There is no cross-examination. Earl S. Hans is called, sworn, and testifies for the Government. U. S. Exhibit 1 is offered and admitted in evidence.

At 12:15 P. M. the jury is reminded of the admonition heretofore given and the Court declares a recess until 2 P. M. At 2:10 P. M. court reconvenes in this case and all being present as before, including the jury, the defendant, and counsel, Roderick H. Mohr is called, sworn, and testifies for the Government and is cross-examined by Attorney Leake.

Louis Morris is called, sworn, and Attorney Leake objects to this witness testifying on the ground that his testimony might incriminate him. U. S. Exhibits 2 and 3 are marked for identification. Witness Louis Morris is cross-examined by Attorney Leake.

Ann L. Joseph is called, sworn, and testifies for the Government on direct examination, on cross-examination by Attorney Leake, and on direct examination by Attorney Tolin.

Antonio Arrigo is called, sworn, and testifies for the Government.

U. S. Exhibits 4, 5, 6, 7, 8, 9 are marked for identification.

U. S. Exhibits 2, 3, 4, 5, 6, 7, 8, 9 for identification are offered and received and marked in evidence.

Witness Antonio Arrigo is cross-examined by Attorney Leake.

Defendant's Exhibits A and B are offered and admitted in evidence.

Witness Antonio Arrigo testifies further on re-direct examination by Attorney Tolin.

The Government rests. At 3:25 P. M. it is stipulated that the jury is admonished and court recesses for a few minutes. At 3:40 P. M. court reconvenes and all being present as before, except the jury, Attorney Leake moves for a directed verdict or dismissal on the grounds of insufficiency of evidence. [37]

Attorney Tolin argues in opposition to motions. Attorney Leake argues further. The Court grants motion to dismiss as to counts 3 and 4 on the grounds that the Government has not shown basic prices, and overrules motion as to counts 1 and 2 and exceptions are noted.

At 4:27 P. M. the jury come into court and the Court announces the dismissal of counts 3 and 4.

William Louis Morris is called, sworn, and testifies in his own behalf. Defendant's Exhibit C is offered and admitted in evidence. Witness William Louis Morris is cross-examined by Attorney Tolin.

The jury is reminded of the admonition heretofore given and court recesses for a few minutes. At 5 P. M. court reconvenes herein and all being present as before, including the jury, the defendant, and counsel, the jury is reminded of the admonition heretofore given and the Court declares a recess in the trial of this cause until 9:30 A. M., January 4, 1945. [38]

At a stated term, to-wit: The September Term, A. D. 1944, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 4th day of January in the year of our Lord one thousand nine hundred and forty-five.

Present:

The Honorable Leon R. Yankwich, District Judge.

No. 17,242-Crim.

United States of America,

Plaintiff,

vs.

William Morris,

Defendant.

This cause coming on at 9:45 A. M. for further trial of defendant William Morris; E. A. Tolin, Assistant U. S. Attorney, appearing as counsel for the Government; E. O. Leake, Esq., appearing as counsel for the said defendant, who is present; and Myrtle Bennallack, Court Reporter, being present and reporting the testimony and the proceedings:

Andrew Morris is called, sworn, and testifies for the defendant, is cross-examined by Attorney Tolin, and testifies further on re-direct examination by Attorney Leake.

Anthony Arrigo, heretofore sworn, resumes the stand and testifies further for the Government, is questioned by the Court, and cross-examined by Attorney Leake. The Government rests.

At 10:10 A. M. it is stipulated that the jury is admonished and the jury retires. Attorney Leake sug-

gests that approval of the Secretary of Agriculture has not been proven. The Federal Register is produced and approval is found. Said motion is denied and exception noted.

At 10:25 A. M. the jury is called back into court and all being present as before including the defendant and counsel, at 10:25 A. M. Attorney Tolin argues in behalf of the Government; at 10:50 A. M. Attorney Leake argues for the defendant; at 10:58 A. M. Attorney Tolin argues for the Government in rebuttal; and at 11 A. M. the Court instructs the jury on the law of this case and there are no exceptions to the charge.

At 11:20 A. M. Bailiffs Fuller and Turner are sworn to take charge of the jury during its deliberation upon a verdict.

Attorney Leake, in the presence of the jury, excepts to the failure of the Court to give requested instructions 3, 4, 5, and 6. At 11:22 A. M. [39] Bailiffs Fuller and Turner are again sworn to care for the jury and the jury retires.

At 11:55 A. M. the jury returns into court and the defendant and counsel being present, the jury is asked if they have agreed upon a verdict and the Foreman replies they have and verdict is presented and read, and it is ordered that the said verdict be filed and spread upon the minutes, the said verdict as filed being as follows:

* * * * *

It is ordered that the cause be, and it hereby is, continued to January 8, 1945, at 2 P. M., for sentence, and that meantime the cause be referred to the Probation Officer for investigation and report.

The jury is discharged and excused until January 5, 1945, at 9:45 A. M. [40]

[Title of District Court and Cause.]

VERDICT

We the jury in the above entitled cause find the defendant William Morris, Guilty as charged in the first count of the amended information, and Guilty as charged in the second count of the amended information.

Los Angeles, California

January 4, 1945

Howard S. Nourse

Foreman of the Jury.

[Endorsed]: Filed Jan. 4, 1945. [41]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR NEW TRIAL

Notice Is Hereby Given that defendant above-named moves the above-entitled court that a new trial be granted in the above-entitled matter upon the following grounds:

1. Insufficiency of the evidence to justify the verdict.
2. Error in law occurring at the trial and excepted to by defendant.

Defendant specifies the following particulars wherein the evidence was insufficient to justify the verdict:

a. The evidence was insufficient to establish that the copy of the statement, Government's Exhibits 2 & 3, introduced into evidence was a record customarily kept relating to prices charged for citrus fruits.

b. The evidence was insufficient to establish the kind and character of records customarily kept relating to the prices charged for citrus fruits. [42]

c. The evidence was insufficient to establish the fact that Morris Bros. Fruit Co. kept a copy of the said statement above mentioned.

D. The evidence was insufficient to establish that any false entry was made in any record kept by Morris Bros. Fruit Co. relating to the prices which it charged for citrus fruit.

The court erred in the following rulings during the trial:

A. The court erred in failing to direct the jury to find the defendant "Not Guilty" or to dismiss Counts One and Two of the Second Amended Information at the close of the Government's case.

B. The court erred in failing to instruct the jury to find the defendant "Not Guilty" or to order dismissal of Counts One and Two of the Second Amended Information at the close of the evidence.

Said motion will be made upon the Second Amended Information, the defendant's plea thereto, all papers and records on file herein, and the minutes of the court.

Dated: January 8, 1944.

MARIO PERELLI-MINETTI and
E. O. LEAKE & J. J. LEAKE

By E. O. Leake

Attorneys for Defendant William Morris [43]

Received copy of the within Notice of Motion for New Trial this 8th day of January, 1945. Charles H. Carr, by Wm. Ritzi, Attorney for Plaintiff.

[Endorsed]: Filed Jan. 8, 1945. [44]

At a stated term, to-wit: The September Term, A. D. 1944, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 8th day of January in the year of our Lord one thousand nine hundred and forty-five.

Present:

The Honorable Leon R. Yankwich, District Judge.

No. 17,242-Crim.

United States of America,
Plaintiff,

vs.

William Morris,
Defendant.

This cause coming on for (1) hearing on motion for a new trial, and (2) hearing Probation Officer's report and for sentence on counts 1 and 2 of the amended information; Wm. Ritzi, Assistant U. S. Attorney, appearing as counsel for the Government; E. O. Leake, Esq., appearing as counsel for the defendant, William Morris, who is present; and Myrtle Bennallack, Court Reporter, being present and reporting the proceedings:

Attorney Leake presents motion for a new trial and the said motion is denied and exception noted. Attorney Leake makes a statement in behalf of the defendant.

The Court pronounces sentence upon the defendant as follows:

District Court of the United States
Southern District of California
Central Division.

No. 17242. Criminal information in 4 counts for violation Emergency Price Control Act of 1942 of U. S. C., Title Pub. L. 421. 77th Cong. 2nd Sess., 56 Stat. 23, January 30, 1942. Secs. Maximum Price reg. 292 as amended. (8 Fed. Reg. 135 and 543.)

United States

v.

William Morris.

JUDGMENT AND COMMITMENT

On this 8th day of January, 1945, came the United States Attorney, and the defendant William Morris appearing in proper person, and with counsel and

The defendant having been convicted on verdict of the jury of the offenses charged in the first and second counts in the above-entitled cause, to wit: Twice, on Oct. 27th, 1943 did unlawfully make a false entry in a material respect in a copy of a statement showing the sale to Aldrich & Co., 14 South Water St., Chicago, Illinois, of the price paid for 582 boxes of oranges, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of six months on the first count of the information, and shall pay to the United States of America a fine in the sum of \$2500.00 on the second count of the information.

It is Further Ordered that the defendant have a stay of execution of judgment for two days.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) Leon R. Yankwich
United States District Judge.

Filed this 8th day of January, 1945.

(Signed) Edmund L. Smith,
Clerk,

(By) Louis J. Somers
Deputy Clerk. [46]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: William Morris, 766 Market Court, Los Angeles 21, California.

Name and address of appellant's attorneys: Mario Perelli-Minetti and E. O. Leake & J. J. Leake, 901 Chester Williams Building, Los Angeles 13, California.

Offense: Violation two counts of Section 205b of the Emergency Price Control Act of 1942, as amended.

Brief description of judgment and sentence: Count One, six months in jail; Count Two, \$2500.00 fine.

Defendant at liberty on own recognizance.

I, the above-named appellant hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above mentioned on the grounds set forth below:

Pursuant to the Rule 5, I hereby serve notice that I do [47] not elect to enter upon the service of the sentence pending appeal.

Dated: January 8, 1944.

William Morris

Appellant

MARIO PERELLI-MINETTI and
E. O. LEAKE & J. J. LEAKE

By E. O. Leake

Attorneys for Appellant

Grounds of Appeal:

1. The evidence is insufficient to support the verdict; the verdict is contrary to law and the evidence.

2. The court should have granted the motion for a directed verdict at the close of the Government's case and also at the close of the entire case.

3. The second amended information fails to state a public offense against the laws of the United States.

4. There is no reasonable or probable cause upon which the second amended information is based.

5. The court erred in rulings made throughout the trial in the case and at the close of the case and in its order over-ruling and denying the motion for new trial.

6. The court erred in instructions given.

7. The court erred in holding and ruling that the Act and orders pursuant thereto are not violative of the Fifth Amendment to the Constitution of the United States.

MARIO PERELLI-MINETTI and
E. O. LEAKE & J. J. LEAKE

By E. O. Leake

Attorneys for Appellant. [48]

Received copy of the within Notice of Appeal this 9th day of January, 1945. Charles H. Carr, U. S. Attorney, by R. Mackay, Attorney for Plaintiff and Appellee.

[Endorsed]: Filed Jan. 9, 1945. [49]

At a stated term, to-wit: The September Term, A. D. 1944, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 9th day of January in the year of our Lord one thousand nine hundred and forty-five.

Present:

The Honorable Leon R. Yankwich, District Judge.

No. 17,242-Crim.

United States of America,
Plaintiff,

vs.

William Morris,
Defendant.

E. O. Leake, Esq., attorney for the defendant, now comes before the Court and states that Notice of Appeal has been filed and requests that bond on appeal be fixed and that the defendant be allowed to remain at liberty on his own recognizance.

It is ordered that the defendant may remain at liberty on his own recognizance pending appeal and that he deposit the sum of \$2,500. as a special recognizance to provide for payment of fine in the event of affirmance of conviction in the Circuit Court of Appeals for the Ninth Circuit. [50]

[Title of District Court and Cause.]

ORDER FIXING BAIL AND STAYING
EXECUTION.

Defendant above named having filed his notice of appeal in the above-entitled court,

It Is Ordered that pending decision on said appeal, defendant remain at liberty upon his own recognizance, and that no bond be required in the premises provided that the defendant deposit the sum of Twenty-five Hundred Dollars (\$2500.00) with the Clerk of the Court to be by him held in registry pending determination of the appeal and if the appeal be dismissed or judgment affirmed to be applied by the clerk to the payment of the fine of \$2500.00.

Dated: This 10th day of January, 1945.

LEON R. YANKWICH

Approved as to form.

CHARLES H. CARR,
United States Attorney

By James M. Carter [51]

Received copy of the within Order Fixing Bail and Staying Execution this day of January, 1945.

CHARLES H. CARR,
United States Attorney

By
Attorney for Plaintiff

[Endorsed]: Filed Jan. 10, 1945. [52]

[Title of District Court and Cause.]

AFFIDAVIT OF E. O. LEAKE, ESQ., IN SUPPORT
OF ORDER EXTENDING TIME WITHIN
WHICH TO PREPARE, SETTLE AND FILE
BILL OF EXCEPTIONS, ETC.

State of California,
County of Los Angeles—ss.

E. O. Leake, being first duly sworn, deposes and says:

That he is one of the attorneys for defendant above named and has been the attorney, and the only attorney, actually engaged in the preparation of the record on appeal of the above-entitled matter.

That your affiant has been unable to complete and lodge the proposed Bill of Exceptions and Assignments of Error in connection with the appeal herein taken and to have the same settled and allowed within the time allowed by law for the reason that within the last 30 days affiant has been confined to his home at different intervals suffering from a severe cold, and there being no other attorney in the office of his law firm of E. O. Leake & J. J. Leake, your affiant has been compelled to handle all legal [53] matters in said office.

That the Honorable Leon R. Yankwich, the judge who tried the above-entitled action has been absent in other divisions of this court since on or about January 11, 1945, and affiant is now informed and believes and therefore states that the said Honorable Leon R. Yankwich is at Fresno, California, and will not return until on or about March 1, 1945.

Affiant has practically completed preparation of said proposed Bill of Exceptions and will be able to serve and lodge the said proposed Bill of Exceptions on or be-

fore Tuesday, February 13, 1945, and respectfully prays that the court make its order extending the time for the serving and lodging of said proposed Bill of Exceptions and Assignments of Error herein up to and including February 13, 1945, and that the United States of America, plaintiff herein, may have up to and including the 28th day of February, 1945, within which to serve and lodge any proposed objections, amendments or additions to said proposed Bill of Exceptions and proposed Assignments of Error, and that defendant William Morris may have up to and including March 15, 1945, within which to settle and have filed his Bill of Exceptions and Assignments of Error.

E. O. LEAKE

Subscribed and sworn to before me this 7th day of February, 1945.

(Seal)

WILLIAM M. CRANDALL

Notary Public in and for said County and State

The foregoing application on the part of defendant is hereby approved.

Dated: This 7th day of February, 1945.

CHARLES H. CARR,

United States Attorney

By Ray H. Kinnison

Attorney for United States

Received copy of the within Affidavit of E. O. Leake, etc., this 7th day of February. Charles H. Carr, United States Attorney, by Attorney for plaintiff.

[Endorsed]: Filed Feb. 7, 1945. [54]

[Title of District Court and Cause.]

ORDER EXTENDING TIME UNDER WHICH TO
PREPARE, SETTLE AND FILE BILL OF EX-
CEPTIONS, ETC.

Good cause appearing therefor, and on application of E. O. Leake, Esq., one of the attorneys for defendant and appellant, William Morris, and conforming to the requirements of Rule 9 of Supreme Court Rules of Practice and Procedure in criminal cases;

It Is Ordered that defendant and appellant, William Morris, may have up to and including the 13th day of February, 1945, within which to prepare, serve and lodge his proposed Bill of Exceptions and Assignments of Error; that the United States of America, plaintiff herein, may have to and including the 28th day of February, 1945, within which to prepare, serve and lodge any proposed objections, amendments or additions to the proposed Bill of Exceptions and Assignments of Error; and that defendant and appellant, William Morris, may have up to and including the 15th day of March, 1945, within which to have settled and filed his Bill of Exceptions and Assignments of Error in the above matter.

Dated: February 7th, 1945.

PAUL J. McCORMICK

Judge of U. S. District Court

Received copy of the within Order, etc. this day of February, 1945. Charles H. Carr, United States Attorney, by, Attorney for Plaintiff.

[Endorsed]: Filed Feb. 7, 1945. [55]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK.

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 59 inclusive contain full, true and correct copies of: Information; Minute Order Entered October 5, 1944; Demurrer to Information; Notice of Motion to Quash and Set Aside Information and on Demurrer; Minute Order Entered October 23, 1944; Amended Information; Notice of Motion to Quash and Set Aside Amended Information; Demurrer to Amended Information; Minute Orders Entered November 6, 1944 and November 13, 1944 respectively; Waiver by Defendant of Right to be Present in Court; Minute Orders Entered November 27, 1944, January 3, 1945 and January 4, 1945 respectively; Verdict; Notice of Motion for New Trial; Minute Order Entered January 8, 1945; Judgment and Commitment; Notice of Appeal; Minute Order Entered January 9, 1945; Order Fixing Bail and Staying Execution; Affidavit of E. O. Leake in Support of Order Extending Time within which to Prepare, Settle and File Bill of Exceptions; Order Extending Time to Settle Bill of Exceptions and Praecept which, together with Original Bill of Exceptions, Original Exhibits and Original Assignment of Errors constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$17.80 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 23 day of March, 1945.

(Seal)

EDMUND L. SMITH,
Clerk

By Theodore Hocke,
Chief Deputy Clerk.

[Title of District Court and Cause.]

DEFENDANT'S ASSIGNMENTS OF ERROR.

Comes now the defendant and appellant in the above-entitled and numbered cause and files the following assignments of error upon which he will rely in the prosecution of this, his appeal herewith petitioned for in said cause from the judgment and sentence of this court entered January 8, 1945.

Assignment of Error No. 1

The court erred in denying the defendant's motion to quash and set aside the amended information made by this defendant on the 27th day of November, 1944, as to Counts 1, 2, 3 and 4 of said amended information, which motion was based upon the following grounds:

That the said amended information and each count thereof fails to state facts sufficient to constitute a criminal offense; that the laws, rules and regulations upon which said amended information purports to be based are arbitrary and discriminatory, unreasonable, invalid, unconstitutional and void; that it does not appear that the United States attorney in and for the Southern District of California, Central Division has been authorized to in-

stitute the above-entitled action by the Secretary of Agriculture or that the Secretary of Agriculture did prior to the commencement of the above proceedings at any time approve the institution of the above-entitled action. That it does not appear that the maximum price alleged is in conformity with the rules and regulations of the Secretary of Agriculture or with the provisions of the Agricultural Marketing Agreement Act of 1937, as amended.

That Counts 1, and 2 of said amended information are indefinite and uncertain in that it cannot be ascertained therefrom how or in what manner the facts therein alleged were in violation of Section 1351.1405(g) of the Maximum Price Regulation 292, as amended, or were in violation of Section 205(b) of the Emergency Price Control Act, as amended.

That Counts 3 and 4 of said amended information are uncertain and indefinite in that it cannot be ascertained therefrom how or in what manner or by what method the alleged maximum prices therein set forth were determined.

That defendant duly excepted to said ruling of the trial court.

Assignment of Error No. 2

That the court erred in overruling the demurrer of defendant to Counts 1, 2, 3 and 4 of the amended information, which demurrer was based upon the following grounds and to which ruling defendant duly excepted:

(a) That said amended information fails to state facts sufficient to constitute a criminal offense.

(b) That Count 1 of said amended information fails to state facts sufficient to constitute a criminal offense.

(c) That Count 2 of said amended information fails to state facts sufficient to constitute a criminal offense.

(d) That Count 3 of said amended information fails to state facts sufficient to constitute a criminal offense.

(e) That Count 4 of said amended information fails to state facts sufficient to constitute a criminal offense.

Assignment of Error No. 3

The court erred in overruling defendant's objection to the introduction of any evidence made at the opening of Government's case, which said motion was made upon the following grounds:

Mr. Leake: If the court please, at this time I desire to make an objection to the introduction of any evidence on the ground that the information doesn't state the facts sufficient to constitute a cause of action. Following that up a little more in detail, it totally lacks any allegation bringing it within the provisions of the Price Control Act, particularly Section 3 of the Act requiring the prior approval of the Secretary of Agriculture. That applies to all four counts.

The second point which I propose to raise is regarding the allegations of the false entry, and along about line 19 it says, "and said record . . . referring to this information . . . was a document . . ."

The Court: Let me look at it. Where is it?

Mr. Leake: Line 19. After reciting "making a false entry," it says: "and said record was a document required to be kept under the provisions of Section 1351.1405(g) of Maximum Price Regulation 292, as amended," and so forth.

Now, the section referred to provides as follows:

“Every intermediate seller selling citrus fruits shall:

“(1) Make and preserve for examination by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, remains in effect, records of the same kind as he has customarily kept relating to the prices which he charges for each item of citrus fruits after the effective date of this regulation, and, in addition, records showing as precisely as possible, the basis upon which he determined maximum prices for each item.”

Now, there is no allegation in Count 1 or Count 2 that they formerly kept any records or that these records were not in conformity with the records customarily kept.

(After a brief discussion of the objections, the jury was excused and the argument proceeded in the absence of the jury)

The objections of defendant to the introduction of evidence was by the court overruled, whereupon the following proceedings were had:

The defendant duly excepted to the said ruling.

Assignment of Error No. 4

The court erred in allowing and admitting into evidence Government's Exhibit No. 1, being a group of invoices, the first document of which bears the number 35642 relating to the alleged sale of oranges by California Fruit Growers Exchange to Morris Brothers Fruit Company. That defendant objected to the introduction of said Exhibit No. 1 on the ground that no proper foundation had been laid for its introduction.

Defendant's objections were overruled and defendant duly excepted.

The only foundation for the admission of said Exhibit No. 1 consisted of the testimony of Earl S. Hans which was in substance as follows:

I am cashier and auditor for California Fruit Growers Exchange and have been so employed since July of 1921. I have brought with me records of the sale of oranges to Morris Brothers Fruit Company by California Fruit Growers Exchange during the week commencing October 17, 1943. These records were kept by the clerk in the ordinary course of business and as a part of the ordinary and regular records. They are kept by one of my assistants under my direction.

Assignment of Error No. 5

The court erred in overruling the objection of defendant to the testimony of the witness Ann L. Josephs, a former employee of Morris Brothers Fruit Company, relative to a practice or custom of said company in making up their statements. Said testimony being as follows:

Question by Mr. Tolin: Did the company have a practice or custom of making these out or was just a single one made, were they made in duplicate or triplicate or what?

Mr. Leake: I will object to that on the ground that it is irrelevant, incompetent and immaterial.

The Court: Well, I think it is admissible. She was head bookkeeper. Go ahead.

Mr. Leake: She has stated she never saw these before.

The Court: It doesn't make any difference. He is asking about a similar document. Go ahead.

To which ruling defendant duly excepted.

The substance of the testimony of the witness was as follows:

Referring to Government's exhibits 2 and 3 for identification, we made these out in duplicate only for shipment on cars. I can tell from the wording that they represent shipments on cars. When a car of fruit was sent out, we were notified from the downstairs office. They told us how many boxes of fruit would be sent at such and such a price. We made out triplicate copies of bills of lading and sent one to the customer with a statement of this kind.

Assignment of Error No. 6

The court erred in overruling the objection of defendant and in admitting into evidence Government's Exhibits 2 and 3, being copies of statements produced by the witness Anthony Arrigo as follows:

Mr. Tolin: I offer in evidence Exhibits No. 2 and 3, for identification.

Mr. Leake: To which we object on the ground that Exhibits 2 and 3 are incompetent, irrelevant and immaterial.

The Court: Let me see this, are those the so-called invoices or statements?

Mr. Leake: Statements.

Mr. Tolin: He testified he received them from the defendant.

The Court: Objection overruled. They may be received in evidence, marked with the numbers that they already have.

To which ruling defendant duly excepted.

Assignment of Error No. 7

The court erred and abused its discretion in denying defendant's motion for a directed verdict as to counts 1 and 2 and for a dismissal as to counts 1 and 2 of the amended information at the close of the Government's case based on the grounds that the evidence adduced by the Government was wholly insufficient to establish the commission of the offenses charged in each of said counts.

The defendant duly excepted to the ruling of the court on said motions.

Assignment of Error No. 8

The court erred and abused its discretion in denying defendant's motion for a directed verdict and for a motion to dismiss as to counts 1 and 2 of the amended information at the close of the evidence. Said motion was made and based upon the grounds that the evidence introduced was wholly insufficient to establish a commission of the offense charged in each of said counts 1 and 2.

The defendant duly excepted to the ruling of the court on said motions.

Assignment of Error No. 9

The court erred in refusing to give the following instruction proposed and offered by defendant, to which refusal the defendant within the time and in the manner prescribed by law duly excepted.

Defendant's Proposed Instruction No. 3

An accomplice is one who aids, abets, or participates in the commission of a crime and is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

Assignment of Error No. 10

The court erred in refusing to give the following instruction proposed and offered by defendant, to which refusal the defendant within the time and in the manner prescribed by law duly excepted.

Defendant's Proposed Instruction No. 4

One who buys at a price above the maximum price fixed by the Rules and Regulations of the office of Price Administrator is equally guilty with one who sells above such prices and is an accomplice in the commission of the crime which may result from such transaction.

Assignment of Error No. 11

The court erred in refusing to give the following instruction proposed and offered by defendant, to which refusal the defendant in the time and in the manner prescribed by law duly excepted.

Defendant's Proposed Instruction No. 5

You are instructed that the Witness, Anthony Arrigo, is by his own testimony an accomplice of the defendant, William Morris, in this action.

Assignment of Error No. 12

The court erred in refusing to give the following instruction proposed and offered by defendant, to which refusal the defendant within the time and in the manner prescribed by law duly excepted.

Defendant's Proposed Instruction No. 6

The testimony of an accomplice, coming from a polluted source, should be received with caution and distrust and you should not place too much reliance thereon unless the same is corroborated by other reliable creditable testimony.

Assignment of Error No. 13

The court erred in overruling defendant's motion for new trial based upon the grounds, first, insufficiency of the evidence to justify the verdict; and second, error in law occurring in the trial and excepted to by defendant.

Defendant duly excepted to the said ruling.

Assignment of Error No. 14

Counts 1 and 2 of the amended information constitute a splitting of one offense into two offenses contrary to law.

Assignment of Error No. 15

The evidence adduced by the Government conclusively shows that the matters alleged in Counts 1 and 2 of the amended information constitute but a single offense.

Conclusion

Wherefore, the defendant, William Morris, by reason of the errors aforesaid, prays that said judgment and sentence against and upon him may be reversed and held for naught.

MARIO PERELLI-MINETTI and
E. O. LEAKE & J. J. LEAKE

By E. O. Leake

Attorneys for Defendant

Received copy of the within Defendant's Assignments of Error this 13th day of February, 1945. Charles H. Carr, United States Attorney, by Ernest A. Tolin, Attorney for Plaintiff.

[Endorsed]: Filed Feb. 13, 1945.

[Endorsed]: Filed Mar. 26, 1945. Paul P. O'Brien, Clerk.

[Title of District Court and Cause.]

ENGROSSED BILL OF EXCEPTIONS.

Be it remembered that on the 5th day of October, 1944, an Information was filed in the above-entitled court.

That on the 16th day of October, 1944, and before the entry of a plea, the defendant filed a demurrer to said Information and to each count thereof, and that also on said date defendant filed a motion to quash and set aside the said Information and each count thereof, and on the 23d day of October, 1944, an order was made granting leave to the Government to amend the said Information.

That on the 1st day of November, 1944, an amended information was filed.

That on the 9th day of November, 1944, defendant served and filed a notice of motion to quash and set aside said amended information.

That on the 9th day of November, 1944, and before the [1*] entry of a plea, defendant filed a demurrer to said amended information, basing said demurrer upon the following grounds:

1. That said amended information fails to state facts sufficient to constitute a criminal offense.

2. That count 1 of said amended information fails to state facts sufficient to constitute a criminal offense.

3. That count 2 of said amended information fails to state facts sufficient to constitute a criminal offense.

4. That count 3 of said amended information fails to state facts sufficient to constitute a criminal offense.

5. That count 4 of said amended information fails to state facts sufficient to constitute a criminal offense.

*Page numbering appearing at foot of page of original Bill of Exceptions.

That on the 27th day of November, 1944, defendant in open court pursuant to the aforementioned notice of motion to quash and set aside said amended information presented arguments on said motion, and the Government likewise presented arguments thereon, and the court thereupon made and entered its order denying said motion, to which order defendant duly excepted.

That on the 27th day of November, 1944, argument was made on said demurrer to said amended information, and the court made and entered its order overruling said demurrer, to which order defendant duly excepted.

That on the 27th day of November, 1944, defendant entered his plea of "Not Guilty" to each and every count of said amended information.

That said cause came on regularly for trial on the 3d day of January, 1945, the Honorable Leon R. Yankwich, Judge presiding, with a jury; the United States of America being represented by Ernest A. Tolin, Esq., Assistant United States Attorney; and defendant being represented by Mario Perelli-Minetti and E. O. Leake & J. J. Leake, Esqs.

That a jury was duly impaneled and sworn, after which [2] the following proceedings were had:

L. L. COLLUM,

called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

My name is L. L. Collum. I am employed by American—

Mr. Leake: If the court please, at this time I desire to make an objection to the introduction of any evidence on the ground that the information doesn't state the facts sufficient to constitute a cause of action. Following that up a little more in detail, it totally lacks any allegation bringing it within the provisions of the Price Control Act, particularly Section 3 of the Act requiring the prior approval of the Secretary of Agriculture. That applies to all four counts.

The second point which I propose to raise is regarding the allegations of the false entry, and along about line 19 it says, "and said record . . . 'referring to this information' . . . was a document . . ."

The Court: Let me look at it. Where is it?

Mr. Leake: Line 19. After reciting "making a false entry," it says: "and said record was a document required to be kept under the provisions of Section 1351.1405(g) of Maximum Price Regulation 292, as amended," and so forth.

Now, the section referred to provides as follows:

"Every intermediate seller selling citrus fruits shall:

"(1) Make and preserve for examination by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, remains in effect, records of the same kind as he has customarily kept relating to the prices which he charges for each item of citrus fruits after the effective date of this regulation, and, in addition, records showing as precisely as possible, the basis upon which he determined maximum prices for each item."

Now, there is no allegation in count 1 or count 2 that they formerly kept any records or that these records were not in conformity with the records customarily kept.

(After a brief discussion of the objections, the jury was excused and the argument proceeded in the absence of the jury.)

The objections of defendant to the introduction of evidence was by the court overruled, whereupon the following proceedings were had:

Mr. Tolin: If the court please, I don't mean to back down from our position, but in the interests of getting on with the case, I would be glad to amend the information by interlineation.

The Court: Of course the information can be amended at any time.

Mr. Tolin: I think we might amend line 23 after the words "1942" to insert "which regulation had been approved by the Secretary of Agriculture." That would end the argument. I don't mean to say that we are not entitled to win the argument, but it would get it past this and down to the case on the merits.

The Court: My only doubt arises, Mr. Tolin, from the fact that it is customary where special authority is needed, you see, to allege the authority.

Mr. Tolin: Yes.

The Court: I think it might be the better policy to amend because we are dealing with an information which can be amended at any stage of the proceedings. With an indictment you cannot do it.

Mr. Tolin: The government would rather do that. The government moves the court for permission with re-

spect to count 1, line 23, after the figure "1942" on page 3 to amend by interlineation, inserting the following: "Which regulation 292 as amended has been approved by the Secretary of Agriculture." [4]

The Court: I will grant the motion of the government to amend so as to show that the regulation has the approval of the Secretary of Agriculture.

Mr. Tolin: I make a motion for a like amendment respecting count 2 by inserting the same words after the word "amended" on line 23 of page 4.

The Court: All right, permission is granted.

Mr. Tolin: I make a like motion regarding the amendment of count 3 on page 5, by inserting the same words after the word "amended" on line 24.

The Court: All right.

Mr. Tolin: I make a like motion with respect to count 4, by inserting the same language on page 7 at line 21 after the word "amended".

The Court: All right. I will hand you the original so as to complete the record. You may make the interlineation.

Mr. Tolin: With respect to Counts 3 and 4, I find the proper place for the interlineation is at line 31 instead of the place I indicated.

The Court: All right, permission will be granted.

Mr. Tolin: I have now interlined the original amended information in accordance with the court's permission, and have marked with a clip the pages to which it refers.

The Court: Not that it is necessary, but just to play safe, are you willing to stipulate that all the proceedings heretofore had on the amended information were had on the amended information as amended?

(Testimony of L. L. Collum)

Mr. Tolin: Yes, Your Honor.

Mr. Leake: So stipulated.

The jury was thereupon recalled to the jury box and the witness L. L. Collum resumed his testimony as follows:

I am employed by the American Fruit Growers, Inc., and have been employed since July 23. I have access to the records [5] of that company showing sale of oranges to Morris Brothers Fruit Company in this city during the week commencing October 17, 1943. I have inspected and searched those records, and I do not find that any sales were made of oranges to Morris Brothers Fruit Company during that week commencing October 17, 1943.

F. S. GUNTHER,

called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

My name is F. S. Gunther, I hold the same position with Mutual Orange Distributors located in Redlands; I have access to the records of their company showing the sale of oranges during the week of October 17, 1943. I am president of the Mutual Orange Distributors. The Mutual Orange Distributors did not sell any oranges to Morris Brothers Fruit Company in Los Angeles during the week commencing October 17, 1943.

EARL S. HANS,

called as a witness by and on behalf of the Government, having been first sworn, was examined and testified as follows:

I am cashier and auditor for California Fruit Growers Exchange and have been so employed since July 21. The company sells oranges to Morris Brothers Fruit Company located in Los Angeles. I have brought with me records of the sale of oranges to Morris Brothers Fruit Company by California Fruit Growers Exchange during the week commencing October 17, 1943. The records which I have are all of the records of my company showing such sales. I recognize this group of pink slips as being the records of the California Fruit Growers Exchange showing sales to Morris Brothers Fruit Company during that week. These records were kept by the clerk in the ordinary course of business and are part of the ordinary and regular records. They are kept by one of my assistants under my direction and supervision. Referring to the invoice which bears No. 35642, the figures 10/18/43 represent the actual [6] date of sale and the figures under the words "price per box" represents the price at which they were sold. Upon the bottom of the page the figures "base price \$4.08" were placed there in accordance with ceiling price regulations.

The group of papers furnished by the witness, the first one of which bears No. 35642 was then offered in evidence.

Mr. Leake: To which we object on the ground that no proper foundation has been laid.

The Court: Objection overruled. They may be received.

(Testimony of Earl S. Hans)

The documents above referred to were marked as Government's Exhibit No. 1 and were received in evidence.

Mr. Leake: May we have an exception?

The Court: All right.

The witness resuming: All these sales relate to oranges. The main office of the California Fruit Growers Exchange is located at 707 West Fifth Street, Los Angeles, California. The oranges were sold at 780 South Alameda Street, Los Angeles, and were delivered to Morris Brothers Fruit Company here in Los Angeles.

Cross-Examination

By Mr. Leake:

Witness: We sold oranges to Morris Brothers Fruit Company prior to these dates. I don't know of my own knowledge to whom this fruit was delivered, and I don't know whether it was resold by Morris Brothers before delivery.

R. G. MOHN,

called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

By Mr. Tolin:

Witness: I am employed at 780 South Alameda Street by the California Fruit Growers Exchange. That firm has a citrus auction house at that address and did have during October, 1943. I am familiar with the customs of the place and how it runs and was during October, 1943. Morris Brothers Fruit Company is a customer of

(Testimony of R. G. Mohn)

the exchange. Fruit bought by Morris Brothers firm [7] was to be loaded on their own trucks any time after the start of the auction and until two o'clock of the day of sale. I recognize Government's Exhibit No. 1. These papers are all marked by the letter "J" on the bottom of the page and in some instances by the letter "B" by the man who trucks them out on a truck.

Cross-Examination

By Mr. Leake:

Witness: This place at 780 South Alameda Street is an auction house where fruit is sold to the highest bidder. Government's Exhibit No. 1 shows fruit sold to the Morris Brothers on the particular days specified. I do not know who bought the fruit on behalf of Morris Brothers. The fruit was delivered to the driver of the Morris Brothers' trucks.

LOUIS MORRIS,

called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination:

I am a member of the firm of Morris Brothers Fruit Company. I am a brother of William Morris, the defendant. I was served with a subpoena to produce the records showing purchase of oranges by Morris Brothers during the week of October 17, 1943. I have not produced the records, Bill Morris has got them. I had the girl look through the files twice after I was served with the subpoena at eleven o'clock yesterday, but she could not find

(Testimony of Louis Morris)

any records due to the fact that we have changed bookkeepers three times, and she couldn't find them. Whatever records there are, Mr. William Morris has them. When I said that the records were in the possession of Mr. William Morris I meant whatever records were there, why, Bill Morris will have them. I couldn't find any record of purchase of oranges during the week of October 17th. As to whether we purchased oranges during that time, my answer is that we had been buying oranges every day. I do not remember whether we bought any oranges from the Mutual Orange Distributors or from the American Fruit Growers during that week. We buy from all exchanges [8] every day whatever we can buy. Any records of purchases during that period were not destroyed, but I do not know where they are. The girl looked twice for them. I have never seen the records.

I do not know Mr. Arrigo, nor anyone employed by Aldrich & Company. I never saw Mr. Arrigo at Morris Brothers. I have never seen him other than in the court room. The same subpoena above referred to called for the production of the records showing the sales of oranges to Aldrich & Company, Chicago, Illinois, during the month of October, 1943. I do not have those records. Bill Morris has got them when he went to consult his lawyer, Mr. Leake. I did not turn the records over to Mr. William Morris. He got them himself. He has the same access to them that I have. We both own an interest in the company. We are partners; if you want you can call me manager. I do everything and I am supposed to be the manager every day. I am still the manager. When William Morris became involved in this case I did not

(Testimony of Louis Morris)

turn those invoices over to him so that he could take them to see his attorney. He went out and got them himself. I had access to them the same as he. I own an interest in that company, so does he.

Question: All right. I call upon you now to produce those records, please.

Mr. Leake: It appears that the witness hasn't got them, if the court please.

The Court: Well, his partner has equal access and if one partner keeps them, how am I going to force him to get in a fight with his brother? You can produce secondary evidence. Each partner has equal access to the books. A partner can't even steal from one another. The only way they settle their affairs is by an accounting!

Mr. Tolin then produced two documents which he had marked Government's Exhibit No. 2, for identification, and Government's Exhibit No. 3, for identification. The statement dated October 27, 1943, which has written on it in addition to the [9] typewritten matter the word "William" was marked Government's Exhibit No. 2 for identification, and the statement which bears the same date, differing from Exhibit No. 2 for identification is that the word "William" does not appear thereon, was marked Government's Exhibit 3 for identification.

The Witness resuming: I recognize Government's Exhibit No. 2, for identification, as being one of the regular statement forms of Morris Brothers Fruit Company. It was the custom of the company to make these up in duplicate. I never saw a duplicate of this statement. I looked for them, but they were gone.

(Testimony of Louis Morris)

Question by Mr. Tolin: You ordinarily kept the copies of all statements, and that had been the custom as long as Morris Brothers had been in business?

A. Now, when you speak of statements, I don't think that the girls in the office are making two copies. When we send a statement to the customer, only one copy is made. On invoices, we make it in two, yes.

Q. Referring to Government's Exhibit No. 2 for identification. The custom was to make a copy of that, wasn't it, or to make it in duplicate? That was the custom?

A. That was the custom.

Q. And that had been the custom so long as you had been in business?

A. Yes.

Q. That is also true of the type of paper that this Exhibit 3 for identification is, isn't it?

A. It is the same.

Witness resuming: I did not have anything to do with the making of the sale represented by either Exhibit 2 or 3 for identification. I am a stranger to that transaction.

Cross-Examination

By Mr. Leake:

I have never seen either one of these statements marked [10] Exhibit 2 or 3 for identification before to my knowledge. I have never seen any copies of them or any originals of them to my knowledge. I do not know in this instance whether or not more than one copy was made. That is not an invoice, that kind of paper is used to send out our statements on. That is entirely different from the invoice. I was not in Los Angeles at the time of these

(Testimony of Louis Morris)

transactions. I think one car was shipped the same day of the transaction and the other one was shipped about a month and a half later.

Redirect Examination

By Mr. Tolin:

The witness examined the Government's Exhibit No. 1, being the pink tickets issued by the exchange in the auction market, and testified as follows:

I had the girl make a search for the copies of these, but she couldn't find them.

Recross-Examination

By Mr. Leake:

None of the oranges represented by the statements, Government's Exhibit No. 1, were ever in storage at La Verne.

ANN L. JOSEPH,

called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

I was employed by Morris Brothers Fruit Company from June 14, 1943 to July 15, 1944, in the capacity of head bookkeeper. Government's Exhibits 2 and 3 I have never seen before.

Question by Mr. Tolin: Did the company have a practice or custom of making these out or was just a single one made; were they made in duplicate or triplicate or what?

(Testimony of Ann L. Joseph)

Mr. Leake: I will object to that on the ground that it is irrelevant, incompetent and immaterial.

The Court: Well, I think it is admissible. She was head bookkeeper. Go ahead.

Mr. Leake: She has stated she never saw these before.
[11]

The Court: It doesn't make any difference. He is asking about a similar document. Go ahead.

Mr. Tolin: May the record show that the witness has before her Exhibits 2 and 3 for identification?

The Witness: We made these duplicates out only for shipment of cars. I can tell by the wording that these represent shipments of cars. When a car of fruit was sent, we were notified by the downstairs office; they told us how many boxes of fruit would be sent at such and such a price. We made out triplicate copies of bills of lading and sent one to the customer with a statement of this kind attached. Not the first one, I mean the first one was kept by the railroad, but the other was sent to the customer with the statement attached. We kept the other with a duplicate statement attached so that when it was paid we would mark that copy paid and put it back in the file so that we kept a permanent record of all these things. The company kept files of the bills of lading. I do not know how far the files went back, but I do know that there were some from the year, 1941.

(Testimony of Ann L. Joseph)

Cross-Examination

By Mr. Leake:

I never saw either one of the statements, Exhibits 2 and 3 for identification. I did not make them out. The accounts receivable clerk made these bills and sent them out. I had nothing to do with making the bills out. I do not know how many copies were made of these particular bills, Exhibits 2 and 3 for identification.

Redirect Examination

By Mr. Tolin:

I know we did some big buying during October, 1943, from California Fruit Growers and Mutual Orange Distributors. I don't know whether we bought anything in that particular week, I wouldn't remember that. I only know we dealt with those concerns.

Recross-Examination

By Mr. Leake:

I know that Morris Brothers dealt with a great many smaller firms. I do not know how many. [12]

ANTHONY ARRIGO,

called as a witness by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tolin:

I am a half partner of Aldrich & Company located in Chicago, Illinois. Their business is supplying oranges, potatoes and vegetables, etc., to hotels, restaurants and

(Testimony of Anthony Arrigo)

dining cars exclusively. About October 15, 1943, I called at the Morris Brothers Fruit Company here in Los Angeles. I talked to William Morris (indicating defendant). I told him I needed oranges and needed them very badly. He said yes, that he would sell me some, any amount I wanted at \$4.50 a case. I said, "That is cheap. I would like to buy some." He said, "Wait a minute. You have got to give me \$1.25 each case on the side." I said, "Oh, no, I can't pay prices like that." So, after an exchange of opinions, I left and went to San Diego for a week. So, that was the end of that conversation.

After I returned from San Diego, I saw the defendant again at the same place. I told Mr. Morris that I got in touch with my Chicago partner and he told me the plight up there was terrific, that he couldn't get any at any price, and he said to get them for whatever we had to pay, because, he said, if we can't get them I can't do business any more. There are no oranges. Get whatever you can, and pay the price. At least we will get our money back and losing a little bit of the profit would make it about right."

I told Mr. Morris I just couldn't get away from California unless I got some oranges because my partner told me we got to have them; that we couldn't operate without them. Mr. Morris said, "You are lucky anyway. By waiting a week you have saved 25 cents. It is \$1.00 even extra today."

I said, "That is fine. Give me a couple of cars and I will pay you and goodbye beautiful California." [13]

(Testimony of Anthony Arrigo)

I bought a couple of cars from Mr. William Morris. He gave me two statements. I recognize Government's Exhibits 2 and 3 for identification as being those statements. That little mark up here on Government's Exhibit 2 for identification which says, "William" I placed there. I wanted to remember who I was dealing with because I knew there was more than one brother, and I wrote that there myself. All of the rest of the statements were written by someone at Morris Brothers Fruit Company. A young girl in the office made out the statements. I did not see whether or not she made any copies of the statements. The typewriting was done in a different room. William Morris gave her the directions.

(It was then stipulated that photostats of certain Cashier's Checks might be used in lieu of the originals.)

Mr. Tolin thereupon produced the following documents: a photostatic copy of a \$1000 Cashier's Check, No. 202225, which was marked by the clerk Government's Exhibit 4 for identification. A photostat of a Cashier's Check for \$2000, No. 202220, which was marked by the clerk Government's Exhibit No. 5 for identification. A photostat of a Cashier's Check in the amount of \$2000, No. 202229, which was marked by the clerk Government's Exhibit No. 6 for identification. A photostat of a check in the amount of \$1000, No. 202224, which was marked by the clerk Government's Exhibit No. 7 for identification. The original of a check signed by Anthony Arrigo in the amount of \$238, dated October 27, 1943, payable to Morris Brothers Fruit Company, which was marked by the clerk Government's Exhibit No. 8 for identification. Govern-

(Testimony of Anthony Arrigo)

ment's Exhibits Nos. 4, 5, 6, 7 (being photostats of the originals), 8 and 9 were all paid by me to William Morris for two cars of oranges bought at the time and represented by Government's Exhibits No. 2 and 3 for identification.

I took delivery of the one car of oranges immediately and paid the transportation. I took delivery of the other car at a later date and also paid the transportation on that. I did [14] not pay Morris Brothers or William Morris any money outside of the checks and did not receive any change when I gave him the checks.

Mr. Tolin: I offer in evidence Exhibits No. 2 and 3 for identification.

Mr. Leake: To which we object on the ground that Exhibits 2 and 3 are incompetent, irrelevant and immaterial.

Th Court: Let me see this. Are those the so-called invoices or statements?

Mr. Leake: Statements.

Mr. Tolin: He testified he received them from the defendant.

The Court: Objection overruled. They may be received in evidence, marked with the numbers that they already have.

Mr. Leake: May I have an exception to the ruling on Exhibits 2 and 3?

The Court: All right.

(Testimony of Anthony Arrigo)

Mr. Tolin: I offer in evidence Exhibit No. 4 for identification; 5, 6, 7, 8 and 9, all for identification.

The Court: They may be received.

The Witness resuming: I received Exhibits 2 and 3, those invoices from Mr. William Morris. I don't remember as to whether the stamp "paid by" was put on after I turned the checks over to him. I do not remember who put the signature on this. I had them in my possession after the transaction was over and they were run.

Cross-Examination

By Mr. Leake:

I got Exhibits 2 and 3 on the 27th day of October. They were prepared in another room. I did not see them prepared. I never saw any copies of the statements other than those which I received. These Exhibits 2 and 3 are my copies and I delivered them to Mr. Tolin.

Exhibit No. 8 which is a check bearing date of October 27, 1943, in the amount of \$238 was written by the young lady [15] who came from the other office. I handed her my checkbook to draw the amount which was necessary in concluding the transaction. She made it out and then I signed it.

The other check bearing date of October 27, 1943, in the amount of \$164 made payable to cash is in my handwriting. The girl did not make that out. Somehow or another I got in the notion to make the check myself, and made it. I made it at the same time that the other check was made. I let the girl make out one and I made out the other. The check for \$164 made payable to cash was not given to Andrew Morris and I never got any money from

anybody. I do not know whether I met Andrew Morris at that time. I know I met one of the Morrises in there. I do have a slight memory of being told that it was Andrew. I think he hung around a little while and he said, "My name is Andrew." I did not ask him to cash the check for me, Exhibit 4 in the amount of \$1000 likewise endorsed by Andrew Morris. It has my endorsement above his endorsement. I did not give this check to Andrew Morris and get the cash on it. I knew at the time of this transaction that ceiling price was \$4.50.

I knew when I bought the oranges that I was paying more than the ceiling price.

The oranges which were shipped to me came from the La Verne Cooperative Storage; both carloads. We had some controversy regarding the oranges and wrote several letters. Among them was a letter addressed to the La Verne Cooperative Citrus Association and because of my complaint I received a refund in the sum of \$436.50 from Morris Brothers. I recognize this check of Morris Brothers in the sum of \$436.50 as the amount received as an adjustment upon our complaint about the quality of the oranges in one car. (The check was thereupon offered and received in evidence as Defendant's Exhibit A.)

The Witness resuming: I recognize this letter on the letterhead of Aldrich & Company. My name is signed to the letter, [16] but I did not sign it. I dictated the letter, however. That portion of the letter reading, "Also you mention something about black market operations, on the remark that we said 'we paid a tremendous price on oranges.' Our remark in that letter means only that we paid the ceiling price and no more, but it is a tremendous price for such a poor quality of oranges."

(Testimony of Anthony Arrigo)

(The letter was thereupon offered in evidence and received as Defendant's Exhibit B.)

Witness resuming: I gave the checks to Mr. William Morris in his private office. The check which the girl made out was made out on the same table in the private office. I signed my name to the check and handed it to Mr. Morris. I don't know why I gave two personal checks. If I had thought of it at the time, I would have given one check. I don't have any specific recollection why the two checks were made, but they were made for the reason that the full amount was then paid. I don't know which of the personal checks, Exhibits 8 and 9 was made out first. I think I handed them to Mr. Morris at separate times.

Redirect Examination

By Mr. Tolin:

The oranges I received were wrapped and packed in boxes. The difficulty I had of spoilage referred to the last car shipped only. That is the car upon which we received the adjustment. As to the first car the quality was just perfect, and I didn't demand any adjustment on the first car because there was no reason for it.

Mr. Tolin: The Government rests.

(The following proceedings were had out of the presence of the jury):

Mr. Leake: If the court please, I move the court at this time for a directed verdict on the ground—

The Court: If you have a good point, make it just to dismiss rather than for a directed verdict.

Mr. Leake: I am rather unfamiliar with the procedure here. [17]

The Court: All right, even if you make it as a directed verdict, I can take it on the other ground, but we prefer to handle the case, especially if your point is good as to one count and not so good as to the other. It confuses the jury to direct the jury as to the one, and have them go on as to the other.

We just say to dismiss and they proceed on the remainder. It makes it simpler.

Mr. Leake: Taking up Count 1 of the complaint, the charging allegation says that William Morris did knowingly, willfully, and unlawfully make an entry false in a material respect, in Morris Brothers *Food Company's* copy of a statement showing the sale to Aldrich & Company and so forth.

Now, we have no evidence of any kind or character before the court as to what the copy of Morris Brothers' copy shows. The only evidence which we have is the copy produced by Aldrich & Company by Mr. Arrigo, a partner of the Aldrich & Company, which he stated was his copy and he never saw any other copy. Therefore, as to the contention of the Morris Brothers Company, there is no evidence of any kind or character.

The Court: Except such inference as may be drawn from the fact that what he was given was a carbon copy, and the original must have conformed to that.

Mr. Leake: I don't believe an inference is sufficient to overcome the presumption of innocence.

The Court: Well, that is an argument.

Mr. Leake: In other words, there is no evidence whatever unless it could be, as the court pointed out, a mere

inference, but he didn't see the other copy. There is no evidence that there was a copy in this particular instance, or if there was a copy, what it contained in this particular instance.

The same objections apply to Count 2. There is no evidence. It is not charged that a false invoice was delivered to Aldrich & Company, but it says Morris Brothers Company. There is [18] no proof that Morris Brothers have a copy of it or that the copy corresponded to the other one which the Aldrich Company—

The Court: It goes a little further than that, and that is that there is no showing that a statement of that kind is a document required to be kept.

Mr. Leake: That is right. There is no showing of that at all.

The Court: That raises the point as to whether there is any showing. After all, invoices are matters of convenience and custom. Some people who send out an invoice follow it by a statement. The invoice is merely information and that statement is to make payment on.

Sometimes you get in a hurry and don't know what the thing is, particularly if you don't know whether to pay it. Sometimes I send out a check. Here recently I waited for a statement from the Water & Power Department, and they called up and said that that was all the statement they send out.

Therefore, when it comes to invoices and statements, the question I raise is whether some showing ought not to be made that an invoice or statement is a document required to be kept.

Mr. Leake: That is true.

The Court: There is no showing of the false entry. They haven't produced the books, the books that are required to be kept. Under the law of California, it is a misdemeanor not to keep books and it is a felony to keep them badly, but there is no law I know of requiring a man to keep invoices. He can carry them on the cuff.

Mr. Leake: This is not even an invoice. This is a blank statement.

The Court: That is what I have in mind. Go ahead. I will hear Mr. Tolin.

Mr. Leake: Now, further, if the court please, as applying [19] now to all the counts, we have no proof whatever of a ceiling price. Just briefly as to what evidence we have at the present time, we have some invoices here from the California Fruit Growers Exchange showing certain purchases were made.

There is certainly no inference from that that they didn't buy any place else. In fact, the evidence that the government produced was that they bought from a large number of different concerns. The testimony of the government's witnesses also shows, particularly the testimony of Mr. Louis Morris, that no part of the purchases covered by these invoices went into the La Verne Packing House, no part of it.

The testimony of Mr. Arrigo was that the oranges which he bought came from the La Verne Packing House, which is the only evidence we have at all that shows that the oranges he got were not the oranges covered by these invoices.

The Court: The rule provides that when you have no other way of figuring the price, you figure by the highest

price he bought the preceding week, regardless of where the shipment originated.

Mr. Leake: I am coming to that. First, I want to point out what the evidence was. We have no evidence before the court first as to the biggest purchase. The only evidence we have are some purchases which don't purport to be all the purchases and were not the oranges which they got.

Now, the law provides for the method of figuring this. Referring to Section 1351.1405, Subdivision (c), which is the subdivision under which the charge is brought—well, before I go into that, I want to point out that they are alleged to be intermediate sellers of a certain class. There is no evidence whatever before the court as to the class of seller they are, but taking the price fixing schedule under which they are proceeding, it says:

“The base price of any intermediate seller who [20] purchased from a packer or broker shall be the base price furnished to him by his supplier.”

In other words, he starts with the base price which is given to him, right or wrong.

The Court: Don't get into that subject, because the O.P.A. and I don't agree on that interpretation. That is one section I have interpreted before. I wrote an opinion on it. They interpret it differently than I do. I interpret it to mean the price the man actually paid. They say the price he paid properly computed by the man from whom he buys. I have an opinion coming up. That is where they and I disagree.

Mr. Leake: Taking this for an example, suppose they sell the oranges to the Morris Brothers for instance for \$6.00 a box and they put on their invoice “Base price

\$6.00" and that is not correct. It shouldn't be that. Nevertheless, under the regulations, Morris Brothers must take that as their base price.

The Court: I agree with you on that. That is what I held in the civil case. The price furnished means "given" and given either orally or in an invoice and doesn't mean the price given by a man who himself has computed it.

We brought that out in another case. Let us not go over that. I haven't changed my mind as indicated by that opinion.

In other words, the price furnished means the price given, and if the other fellow overcharged him, why, Morris Brothers are not my brother's keeper. So go after him and not after me. You and I agree on that.

I won't ask Mr. Tolin his view because they have had their opportunity in another case. I am merely telling him I am still of the same opinion.

Mr. Leake: There is no evidence in this case as to the base price of oranges sold to Aldrich & Company, not one iota, because the evidence establishes that it wasn't the oranges bought from the fruit exchange. It was some other oranges. [21]

Furthermore, these statements show this car to contain Sublime, Splendor and Blue Base Brands. Each statement contains the same notations.

The Court: That is right.

Mr. Leake: On these invoices, which are the only purchases they show, we find none of those brands. So, we not only have that, but again I say we have the testimony that these oranges didn't go into that packing house and couldn't be the oranges, so where is the base price to start with on oranges sold to Aldrich & Company?

Then in addition to that, it goes on as follows:

“The ‘base price’ of any intermediate seller who purchases from an auction market, commission merchant, or terminal seller shall be the ‘base price’ of his supplier,” and so forth.

These were auction market oranges. There is no showing that the others are.

Continuing:

“Except that if his supplier is not within local hauling distance of his customary receiving point, the intermediate seller shall compute a new ‘base price’ by adding to that ‘base price’ the freight to his customary receiving point.”

There is no showing here again where the oranges came from, whether any freight charges were involved or not, whether delivered or not. Now, delivery from Morris Brothers to their customer has nothing to do with delivery to Morris Brothers. Suppose they bought them in Arizona and had to pay the freight here?

The Court: There is another regulation which computes it as saying the nearest packing house.

Mr. Leake: That is where it is a local concern.

The Court: That is right. [22]

Mr. Leake: To go on:

“If he resells to another intermediate seller, he shall give such purchaser notice in writing of his ‘base price’ reported to him by his supplier or his newly computed ‘base price,’ as the case may be.”

Then it goes on as follows:

“(d) The ‘base price’ of any intermediate seller who purchases from an intermediate seller shall be the same ‘base price’ reported to him by his supplier.

“(e) The intermediate seller shall calculate his maximum price for each item of citrus fruit for each calendar week as follows:

“(1) He shall first determine his proper class under Paragraph (b) of this Section.

“(2) He shall next determine the ‘largest single purchase’ made by him during the preceding calendar week of the citrus fruit for which he is calculating his maximum price.”

There is no proof here whatever regarding any purchases of the brands with which we are dealing.

Then it goes on as follows:

“The ‘largest single purchase’ means the greatest quantity of the item for which he is determining a maximum price, purchased in one lot, and which was delivered to his customary receiving point during the preceding calendar week. The ‘preceding calendar week’ is the calendar week preceding the week for which he is calculating his maximum price.

“(3) He shall next obtain his base price for his ‘largest single purchase’ during the preceding calendar week. In the event that he made two or more purchases of the quantity which would be his ‘largest single purchase,’ he shall use as his base [23] price the average of the base prices for such purchases.

“(4) He shall then compute his maximum prices as follows:

“(i) An intermediate seller in Class 1 or Class 2 who buys from a packer, broker, auction market or terminal seller, shall multiply his base price by 1.095.

“(ii) An intermediate seller in Class 1 or 2, who buys from another intermediate seller or from a commission merchant shall multiply his base price by 1.20.

“(iii) An intermediate seller in Class 3 who buys from a packer, broker, auction market or terminal seller shall multiply his base price by 1.21.

“(iv) An intermediate seller in Class 3 who buys from another intermediate seller or from a commission merchant, shall multiply his base price by 1.32.

“(5) The resulting figure in each case shall be the maximum price of the intermediate seller for the calendar week for the item of citrus fruit being priced.”

Then we go on with a different formula and they haven't brought us under either formula:

“(6) In the event that the intermediate seller received no deliveries of the item being priced, during the preceding calendar week, but made sales of the item during the preceding calendar week, his maximum price remains unchanged from his maximum price of the preceding calendar week. In the event that he received no deliveries and made no sales of the item during the preceding calendar week, he shall calculate his maximum price for the item in the same

manner as set forth in this section [24] except that he shall use the base price of the first lot of the item delivered to him during the calendar week for which he is computing a maximum price and the maximum price so calculated shall continue to be his maximum price for the remainder of the calendar week."

Now, we submit that every item upon which the court or a jury might determine a maximum price is missing in this case. There isn't any place to start and there isn't any figures upon which we can rely in the multiplication or in reaching a maximum price.

I submit that that applies to all counts and any prices. The objection applies to the first two counts.

Mr. Leake: I have one more thought with reference to the first two counts. There is no evidence here. The testimony was that the girl in the next office made up these statements. There is no evidence that William Morris made any false entry in the records of Morris Brothers Fruit Company.

The Court: Well, of course the testimony must be taken in conjunction with the testimony of Mr. Arrigo as to what the agreement was, as to the direction which Mr. Morris gave of the computing of the bill and the manner of payment, and that is a question of fact for the jury to determine in the light of any additional testimony given on the part of the defendant.

I will grant the motion as to Counts 3 and 4 on the ground that the government has not met the burden of

proof on the basic price. It is up to the government to show the foundation for the basic price, and the government's testimony was merely to the effect that certain purchases were made from some concern and the evidence has shown that they have bought from others, or may have bought from others.

There is no showing as to what the basic price was for the preceding week, and for that reason Counts 3 and 4 are not proved and will be dismissed. [25]

The motion as to Counts 1 and 2 will be denied.

Mr. Leake: May we have an exception?

The Court: Yes. All right, bring in the jury.

(Thereupon, the proceedings were resumed within the presence and hearing of the jury as follows:)

The Court: Let the record show that the jury has returned and that the defendant is present with counsel.

Ladies and gentlemen, as a result of certain motions that have been made, the court has dismissed Counts 3 and 4. Those are the counts, if you remember, which charged the selling at excess prices.

There remain before you for consideration Counts 1 and 2 which relate to the same transaction but merely charge that the price at which the sale was made was falsely entered upon books or documents required to be kept by the defendant, so that only two counts remain in the case.

You may proceed.

WILLIAM MORRIS,

the defendant herein, called in his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Leake:

I am one of the partners of the Morris Brothers Fruit Company. That company has been doing business in Los Angeles since 1928. Their place of business is at 766 Market Quarter. We have five doors and upstairs we have four or five offices where the girls work. They work there and we work downstairs. On the main floor we have oranges, lemons and grapefruit. There is a private office upstairs at the front of the mezzanine. It looks out over the floor below. There are large windows all along the side looking out over the floor below. These windows are kept open. From the main floor of the store anyone can see into the private office.

Morris Brothers do a gross business of around a [26] million dollars a year.

I first met Mr. Arrigo in October, 1943, and had a transaction with him on October 27, 1943.

He came in one day and asked me for oranges. That was couple days before the sale.

I told him that at that time we didn't have any oranges; that the oranges were at La Verne in cold storage, and if he wanted to see them he could go and look at them and then come back and we would make a deal. That was all of the conversation at that time. I did not tell him that I would require \$1.25 above the ceiling.

He returned in a couple of days. He said he had seen the oranges and wanted two cars. I sold them to him at \$4.50 per box.

(Testimony of William Morris)

I never saw the check dated October 27, 1943, in the amount of \$164 endorsed by Andrew Morris before this time. That check was not given to me as part payment for the oranges. I did not get any of the checks. The girl got the checks. She made out the bill and got the checks and deposited it. None of the checks were handed to me. I saw the checks. I counted them and passed them to the girl. I did not see Government's Exhibit No. 9 at that time. That was never given to me at any time as part payment for the oranges. The signature on the back is the signature of Andrew Morris, my brother. I never saw the original check of which is Government's Exhibit No. 4 before. The endorsement on the back is the endorsement of my brother.

I never at any time got any money from Mr. Arrigo in addition to \$4.50 per box. The girl figured the price. I did not tell the girl anything about what to put on the statements. The girl deposited those checks in the bank.

(A duplicate deposit slip of Morris Brothers was thereupon offered and received in evidence as Defendant's Exhibit C). [27]

Cross-Examination

By Mr. Tolin:

Mr. Andrew Morris is my brother. He is in business with me.

So far as I know \$4.50 per box set forth on the invoice is the correct ceiling price.

Louis Morris was the manager in charge. He was away in New York during this week of October 27. I was in charge in his absence. I had complete charge of the place.

(Testimony of William Morris)

I had charge over the bookkeepers and clerks and gave them directions which they carried out. In some instances I checked up on them to see that they were following my directions. During the absence of Louis Morris, my brother Andrew was helping me run the place.

ANDREW MORRIS.

was called as a witness by and on behalf of the defendant, having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Leake:

I am one of the partners of the Morris Brothers Fruit Company. I have been such partner for 15 years more or less. I was introduced to Mr. Arrigo by my brother when he came into the store to buy oranges. I saw Mr. Arrigo four or five hours after I first met him. He came into the store and asked for Bill. My brother was out of the store, and he asked me if I could help him. I said "Yes." He said, "I got to have some money and cash a check." I told him that we can cash the check.

I recognize Government's Exhibits No. 4 and 9. Exhibit 4 is a photostat of a check. That is my signature on the back of those checks. I cashed those checks for Mr. Arrigo. I gave him the cash in the amounts of those checks.

Cross-Examination

By Mr. Tolin:

I gave him the exact amount of the checks in cash. He didn't buy anything at that time. The money I used was

(Testimony of Andrew Morris)

my personal money. I didn't take it out of the till. Most of the business [28] of Morris Brothers is transacted as a cash business. We sell oranges in carload lots and truck-load lots. People pay in cash and the cash goes into the register. I have access to the register. I cannot remember whether I cashed both of the checks at the same time. My brother was not there. He was not there when I cashed these. He was not in the store at the time Mr. Arrigo came. When I cashed the checks my brother was out. At the time my brother introduced me I had asked whether Arrigo's credit was good to cash checks, but at the time the checks were cashed my brother was not there and I took that money out of my own pocket and gave it to him. I don't remember whether I cashed both of these checks for Mr. Arrigo at the same time or different times. I don't know whether it was one or two days after. I saw Mr. Arrigo only a couple of times. At the time he came in and made the purchase my brother introduced me, then he came back later and asked for my brother and my brother being out I cashed these checks for him. Those are the only times I saw him. I see him here in court (indicating the witness Anthony Arrigo). At the time I cashed the checks I knew Mr. Arrigo had bought two carloads. I don't know exactly how many boxes were in those carloads, but I know there are no less than 462 boxes in a carload. Most of them are 462 in a straight car. I know 462 and up. I didn't know that the checks

(Testimony of Andrew Morris)

that he was cashing were exactly a dollar per box because most of them are 462 boxes in a straight car.

We close our business day at two o'clock in the afternoon. Under market regulations we cannot sell after two o'clock. We start at six o'clock in the morning. I saw Mr. Arrigo only a couple of times.

Mr. Arrigo came in the first time around nine o'clock in the morning. He came back to cash the checks around two o'clock in the afternoon. I didn't take him to the bank. Our bank is [29] located at 8th and Central. I have a personal account at Indiana and Whittier. I am known at the bank at 8th and Central. I could cash a check or identify a person at the bank, but I had the money in my pocket.

Redirect Examination

By Mr. Leake:

I do a great deal of buying for the firm. That buying is usually done in cash. That is why I always carry a large amount of money with me. When I use my own money for that purpose, I reimburse myself from company funds. At the time I cashed these checks, I knew Mr. Arrigo had bought two carloads of oranges. I did not know exactly how many boxes were in the car. Most cars consist of 462 boxes.

The defense rests.

ANTHONY ARRIGO,

a witness called by and on behalf of the government, having been previously duly sworn, resumed the stand and testified as follows:

Direct Examination

By Mr. Tolin:

I am not sure whether I know Mr. Andrew Morris. I guess I must have talked to him and probably six or eight others one morning there. I never asked him to cash any checks for me, and he never cashed any checks for me. Government's Exhibit 8, a check for \$238.00 was not written by me. The \$164.00 check was completely written by me. As to whether anything was said by Mr. William Morris to me about the time I wrote that check as to a reason for writing it a separate check, my answer is it was to complete the two times 582. My cashier's check was made for \$2000 and I couldn't break any of them to complete the deal so I drew a separate check to complete the amount.

The Court: I think that creates confusion. Let me see if I can clear this up. When you came here to buy fruit, you brought with you cashier's checks made out to you?

The Witness: That is right, sir. [30]

The Court: And they were in round sums?

The Witness: Even sums.

The Court: Even sums. That is a good word. So, when you bought these two carloads, you pulled out of your pocket a check for \$1000.00?

The Witness: Yes.

The Court: And then endorsed it on the back?

(Testimony of Anthony Arrigo)

The Witness: That is right.

The Court: And then you pulled out another one for \$2000 and endorsed it on the back?

The Witness: Yes.

The Court: This was a cashier's check that would be honored where a personal check might not be?

The Witness: Yes.

The Court: And then you pulled out another. That made \$4000.00?

The Witness: Yes.

The Court: And then you signed the check for \$238.00?

The Witness: That is right, sir.

The Court: To make up the purchase?

The Witness: To complete the purchase.

The Court: As shown by the two statements?

The Witness: Yes, sir, that is right.

The Court: All right. Then, when you came to pay, you took the \$1,000.00 and made out the \$164.00 to make up the twice 582?

The Witness: That is correct, sir.

The Court: I think the reason for the confusion was that these should have been passed to the jury. Perhaps you had better pass them to the jury now.

Mr. Tolin: Yes, sir.

Q. By Mr. Tolin: Did you buy any other fruit while you were here? [31] A. No, sir.

Q. Where did you stay while you were in town?

A. At the hotel, in the Rosslyn Hotel.

Q. Did you have other funds with you?

A. I had current cash.

Mr. Tolin: That is all. You may inquire.

(Testimony of Anthony Arrigo)

Cross-Examination

By Mr. Leake:

Q. Did you hand all these checks over at one time?

A. Yes, sir.

Q. The whole bunch?

A. No. I may correct that. The \$1000.00 check and the \$164 check was handed at different times.

Q. At a different time?

A. Yes. I would say five minutes or ten minutes afterwards.

The Court: You completed one transaction and then the other?

The Witness: Yes.

The Court: All right.

Mr. Tolin: Was that handled at the same session at the same time you were at the office?

The Witness: It was only a matter of five or ten minutes apart.

The Court: You didn't go out in the meantime?

The Witness: No.

The Court: You were still there. Just five minutes elapsed between the time you handed over the first and the second sales?

The Witness: The \$164.00 check was written by me all the way down the line, your Honor.

The Court: I know. You have told us that.

Q. By Mr. Leake: Did you come back there in the afternoon? [32]

A. No. After I completed the deal, I went away.

Q. Didn't you come back? A. No, sir.

Q. At any time? A. No sir.

The government rests and the defense rests.

On January 4, 1945, government and defendant having rested their respective cases, the defendant Morris made a motion for a directed verdict and a motion to dismiss as to the remaining counts; namely, Counts 1 and 2 upon the ground that the evidence introduced by the government was insufficient to sustain the charges contained in said Counts 1 and 2 or either of them, which said motion was by the trial court denied and defendant duly excepted thereto. Following argument by counsel, the court thereupon charged the jury as follows:

The Court: Ladies and gentlemen, you are about to hear instructions from the court on the law which is to cover your determinations in this case. All the instructions are written except the informal instructions given at the end as to your conduct in the jury room.

If, after you begin your deliberations, some questions arise about the instructions, they will be sent to you on request. You are also entitled to have all the exhibits that have been introduced in evidence while you are deliberating on this case.

The law of the United States permits a judge to comment on the facts in the case. Such comments are mere matters of opinion which the jury may disregard if they conflict with their own conclusions upon the facts. This for the reason that the jurors are the sole and exclusive judges of the facts in each case. However, it is not my custom to exercise this right nor shall I exercise it in the present case. I shall leave the determination of the facts in the case to you, satisfied as I am that you are fully capable of determining them without my aid. However, it is the [33] exclusive province of the judge of this court to instruct you as to the law that is applicable to the case. in

order that you may render a general verdict upon the facts in the case, as determined by you, and the law as given you by the judge in these instructions. It would be a violation of your duty for you to attempt to determine the law or to base a verdict upon any other view of the law than that given you by the court—a wrong for which the parties would have no remedy, because it is conclusively presumed by the court and all higher tribunals that you have acted in accordance with these instructions as you have been sworn to do.

During the course of the trial, I have, at various times, asked questions of certain witnesses, including the defendant. My object in so doing was to bring out in greater detail certain of the facts not yet fully testified to by the particular witness. If, from these questions, you have formed the inference that I have an opinion as to the particular facts to which the questions related, it is your right to treat it as an opinion which you are at liberty to disregard in arriving at your own conclusions, as to the particular facts or as to other facts in the case.

You are here for the purpose of trying the issues of fact that are presented by the allegations in the information and the plea of the defendant thereto. This duty you should perform uninfluenced by pity for the defendant or by passion or prejudice on account of the nature of the charge against him. You are to be governed, therefore, solely by the evidence introduced in this trial, and the law as given you by the court. The law will not permit jurors to be governed by mere sentiment, conjecture, sympathy, passion or prejudice, public opinion, or public feeling. Both the public and the defendant have a right to demand, and they do so demand and expect, that you will carefully and

dispassionately weigh and consider the evidence and the law of the case and give to each your conscientious judgment; and that you will reach a [34] verdict that will be just to both sides, regardless of what the consequences may be. The offense with which the defendant is charged is: Violation of the Price Control Act of 1942.

In this connection, you are instructed that the information on file herein is a mere charge or accusation against the defendant and is not any evidence of the defendant's guilt, and no juror in this case should permit himself to be, to any extent, influenced against the defendant because or on account of such information on file.

It is the duty of the jury to decide whether the defendant be guilty or not guilty of the offense charged considering all the evidence submitted to you in the case.

The jury are the sole and exclusive judges of the effect and value of the evidence addressed to them and of the credibility of the witnesses who have testified in the case, and the character of the witnesses as shown by the evidence, should be taken into consideration, for the purpose of determining their credibility and the fact as to whether they have spoken the truth. And the jury may scrutinize not only the manner of witnesses while on the stand, their relation to the case, if any, but also their degree of intelligence. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testified, his interest in the case, if any, or his bias or prejudice, if any, against one or any of the parties, by the character of his testimony, or by evidence affecting his character for truth and honesty or integrity or by contradictory evidence; and the jury are the exclusive judges of his credibility.

A witness may also be impeached by evidence that he made, at other times, statements inconsistent with his present testimony as to any matter material to the cause on trial.

A witness false in one part of his or her testimony is to be distrusted in others; that is to say, the jury may reject the [35] whole of the testimony of a witness who has wilfully sworn falsely as to a material point; and the jury, being convinced that a witness has stated what was untrue, not as a result of a mistake or inadvertence, but wilfully and with the design to deceive, must treat all of his or her testimony with distrust and suspicion and reject all unless they shall be convinced that notwithstanding the base character of the witness, that he or she has in other particulars sworn to the truth.

The law does not require any defendant to prove his innocence, which, in many cases, might be impossible. On the contrary, the law required the government to establish his guilt and that by legal evidence and beyond a reasonable doubt.

If you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case, find the defendant not guilty. Reasonable doubt is not a mere possible doubt. Because everything relating to human affairs, and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

While the defendant in a criminal action is not required to take the stand and testify, yet if he does so, his credibility and the value and effect of his evidence are to be weighed and determined by the same rules as the credibility and effect and value of the evidence of any other witness is determined. And the tests for determining credibility of witnesses as given you in another part of the instructions are to be applied to his testimony alike with that of other witnesses.

While originally the information contained four counts, the defendant is on trial on two counts only, counts one and two. [36]

You will give to each count individual consideration. The language of counts one and two is identical, and hence, the elements which the government must prove as to these two counts are the same. However, it is contended by the government that the transaction charged in Count Two is a different one from that charged in Count One, and in order to sustain a guilty verdict as to both Counts One and Two, you must so find. Otherwise only one of said counts can be sustained, if proved.

If you believe beyond a reasonable doubt that on or about October 27, 1943, defendant sold five hundred and eighty two boxes of oranges to Aldrich & Company at a price of \$5.50 per box, or for a total sum of \$3,619.00, and that said transaction was on behalf of Morris Brothers Fruit Company, and that defendant wilfully and deliberately, and not as a result of innocent mistake entered upon said Morris Brothers Fruit Company's copy of a statement showing such sale, an entry that the sale had been made at a price of \$4.50 per box or a total sale price of \$2,619.00, and that the statement was made in a record of

the kind customarily kept by Morris Brothers Fruit Company during the time prior to January 11, 1943 (effective date of Regulation) then you will find defendant guilty as charged in Count One of the Information, regardless of what you may believe the correct ceiling price of such oranges to have been at said time.

On the other hand, if you entertain a reasonable doubt as to whether any one or more of the elements I have just recited to you have been proved, you must give the defendant the benefit thereof and acquit him.

As to Count Two, the elements are identical and you will convict defendant of that Count, provided, that in addition to the elements I have read you also believe that the transaction pleaded in Count Two has been proven to be a distinct one from that charged in Count One, otherwise you will acquit as to Count Two.

The court instructs you that the regulation under which this [37] case arose, Maximum Price Regulation 292, was promulgated by the Price Administrator on December 31, 1942, to become effective January 11, 1943, and was duly approved by the Secretary of Agriculture before its promulgation, and that all this was done pursuant to the authority granted by the Congress of the United States in the Emergency Price Control Act of 1942, as amended.

The regulation was duly published in Volume 8 of Federal Register, pages 135-138, under date of January 5, 1943.

In every criminal offense there must be concurrence of act and intent. This is especially true in an offense like the present one which requires that the act shall be done knowingly and wilfully.

This intent is a material element of the offense which, like all others, must be proved beyond a reasonable doubt.

In determining the question, you are to consider all the facts and circumstances in the case which touch the conduct of the defendant, as well as his declarations or admissions, if any.

Criminal intent may be implied from the acts, conduct, declarations or admissions of the defendant. Such acts, conduct, declarations or admissions as shown by the evidence, considered in relation to the charge made, may establish criminal intent beyond a reasonable doubt.

You will note that under the information the acts are alleged to have been done knowingly, and wilfully.

Doing or omitting to do a thing knowingly and wilfully implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it.

The word "wilfully" denotes an act which is intentional or knowing, or voluntary, as distinguished from accidental. When used in a criminal statute, it generally means an act done with a bad purpose. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked [38] by careless disregard whether or not one has the right so to act.

You are instructed that whoever aids, abets, counsels, commands, induces or procures the commission of an act constituting an offense in any law of the United States is guilty of the offense so committed. So it is not necessary for you to believe that the defendant personally made the entries in the statements which the government charges he made. Therefore, if you believe beyond a reasonable doubt that the defendant aided, abetted, counseled, commanded,

induced or procured the making of the statements or either of them by others in his employ, then you may hold him responsible for them as if he had actually done the physical preparation himself.

The first duty upon retiring to the jury room will be to select one of you to act as foreman.

In the Federal Courts, both civil and criminal cases, all 12 jurors must agree before a verdict is returned. That differs from the State Courts where in civil cases 9 out of 12 may return a verdict.

For your assistance, the Clerk of the court has prepared a verdict which reads:

“Verdict: We, the jury in the above-entitled cause, find the defendant William Morris, as charged in the first count of the amended information, and, as charged in the second count of the amended information.

“Los Angeles, California

“January, 1945.

“....., Foreman of the Jury.”

You must render a verdict upon each of the counts. The verdict, of course, need not necessarily be the same because I have already explained the circumstances which are necessary and a situation may arise where you might find the facts as to one count differing from the facts as to the other, which would warrant [38] different verdicts in the two counts.

Should you find the defendant not guilty on Count One, you will insert the words “not guilty” after his name as to the first count. Should you find him guilty as to the first

count, you will insert that word on the second line after the first count. Should you find him not guilty on Count Two, you will insert different words. Whichever your verdict is, it must be fully filled out and signed by your foreman and dated in the place indicated and returned to the courtroom.

The Court: Are there any exceptions to the instructions given by the court?

Mr. Tolin: None, your Honor.

Mr. Leake: None, your Honor.

The Court: Will counsel and the reporter approach the bench?

(Thereupon, the following proceedings were had outside of the hearing of the jury.)

The Court: Just because you haven't been in the Federal Courts, I wondered if you intended to offer any objections to the instructions offered, because those exceptions you must make at this time.

Mr. Leake: Yes, your Honor.

The Court: Well, you will have to make them in open court as to each of the instructions.

Mr. Leake: Thank you very much.

(Thereupon, the following proceedings were had within the hearing of the jury.)

The Court: I think counsel possibly misunderstood my statements about exceptions to the instructions given. I should have said instructions refused. We use that phrase, but we mean that it is to apply to those refused also, and for that reason I will ask now if counsel for either side

have any exceptions to [39] any of the instructions proffered by them and not given by the court?

I will explain to the jury that counsel are required to present their views on the law to the court, and the court either adopts them, modifies them, or rejects them, and counsel are also required to indicate to the court before the jury retires any exceptions they may have to those instructions. It is the only place in the record they can show their dissatisfaction in order to state it later on in a higher court.

All right.

Mr. Leake: Shall I refer to them by number?

The Court: Yes. I know what they consist of.

Mr. Leake: I wish to except to the court's failure to give instruction No. 3 relating to an accomplice, No. 4 relating to the guilt of the one who buys, No. 5 and No. 6.

The Court: Well, I will say this. In accomplice cases they give an instruction, not in the form you give it, because the federal law does not require corroboration. All you do is merely state that an accomplice's testimony should be viewed with suspicion. However, with the elimination of the two counts, there is no accomplice question before the court because the regulation charges him with keeping books, and an accomplice must be guilty of the same offense, and the regulation does not require the buyer to keep any books.

Therefore, with Counts Three and Four, the question became moot and I can't very well give an instruction on accomplices because on Counts One and Two, Mr. Arrigo was not an accomplice.

The instruction will remain as given by the court.

(The exceptions indicated were allowed by the court.)

The Court: Swear the bailiff.

(Thereupon the bailiff was duly sworn.)

The Court: You will now retire and begin your deliberations [40] in the case, and as I have already informed you, after you have organized by electing a foreman, if you want the instructions and exhibits, they will be brought out to you if you make that known to the bailiff at the door.

(Thereupon the jury retired to deliberate.)

Defendant's Requested Instruction No. 3

An accomplice is one who aids, abets or participates in the commission of a crime and is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

Defendant's Proposed Instruction No. 4

One who buys at a price above the maximum price fixed by the rules and regulations of the Office of Price Administrator is equally guilty with one who sells above such prices and is an accomplice in the commission of the crime which may result from such transaction.

Defendant's Proposed Instruction No. 5

You are instructed that the Witness Anthony Arrigo is by his own testimony an accomplice of William Morris, the defendant in this action.

Defendant's Proposed Instruction No. 6

The testimony of an accomplice, coming from a polluted source, should be received with caution and distrust and

you should not place too much reliance thereon unless the same is corroborated by other reliable and creditable testimony.

On January 4, 1945, the jury returned a verdict of "Guilty" as to the charges contained in Count 1, and returned a verdict of "Guilty" as to the charges contained in Count 2.

The court fixed January 8, 1945, as the time for pronouncement of judgment and sentence.

On January 8, 1945, defendant filed his motion for new trial, and the defendant thereupon moved the court upon each and [41] every of the grounds therein stated that the verdict of the jury be vacated and set aside, and that a new trial be granted. Said motion for new trial was in words and figures as follows, to wit:

(Title of Court and Cause)

"Notice Is Hereby Given that defendant above-named moves the above-entitled court that a new trial be granted in the above-entitled matter upon the following grounds:

- "1. Insufficiency of the evidence to justify the verdict.
- "2. Error in law occurring at the trial and excepted to by defendant.

"Defendant specifies the following particulars wherein the evidence was insufficient to justify the verdict.

“a. The evidence was insufficient to establish that the copy of the statement, Government’s Exhibits 2 and 3, introduced into evidence was a record customarily kept relating to prices charged for citrus fruits.

“b. The evidence was insufficient to establish the kind and character of records customarily kept relating to the prices charged for citrus fruits.

“c. The evidence was insufficient to establish the fact that Morris Bros. Fruit Co. kept a copy of the said statement above mentioned.

“d. The evidence was insufficient to establish that any false entry was made in any record kept by Morris Bros. Fruit Co. relating to the prices which it charged for citrus fruit.

“The court erred in the following rulings during the trial:

“A. The court erred in failing to direct the jury to find the defendant “Not Guilty” or to dismiss Counts One and Two of the Second Amended Information at the close of the Government’s case.

“B. The court erred in failing to instruct the jury to find the defendant “Not Guilty” or to order dismissal of Counts One and Two of the Second Amended Information at the close of the evidence. [42]

“Said motion will be made upon the Second Amended Information, the defendant’s plea thereto, all papers and records on file herein, and the minutes of the court.”

The court thereupon denied defendant's motion for new trial and defendant duly excepted thereto.

The court thereupon pronounced judgment and sentence as follows:

The Court: It is the judgment of the court that the defendant for the offense of which he has been convicted in Count One of the information, shall be sentenced to an institution of the jail type for a period of six months.

It is the judgment of the court that for the offense of which he has been convicted in Count Two of the information, he shall be fined the sum of \$2500.00.

On January 9, 1945, defendant filed his notice of appeal from said judgment.

On January 10, 1945, the court made an order staying execution and allowing defendant to remain at liberty on his own recognizance pending appeal upon condition that defendant deposit the sum of \$2500.00 in registry pending appeal as provided by law in such cases, which said sum defendant thereupon deposited.

On the 7th day of February, 1945, the court, upon application of defendant, made an order extending the time for lodging the proposed Bill of Exceptions and Assignments of Error to and including the 15th day of March, 1945.

Thereafter, the following Stipulation was entered into:

“In the United States Circuit Court of Appeals
for the Ninth Circuit

“WILLIAM MORRIS,)	“No. 10967
)	
Appellant,)	
)	
-vs-)	
)	“STIPULATION
UNITED STATES OF)	
AMERICA,)	
)	
Appellee.)	[43]

“Whereas, the Government’s and defendant’s exhibits in evidence in the above-entitled action which are on file in the office of the clerk of the United States District Court of California, Southern District, Central Division, are in many instances very difficult to reproduce either by typewriting or by printing and would tend to make the transcript of the record on appeal voluminous and bulky; and

“Whereas, the exhibits contain matters which both parties desire the court to see in their original form; and

“Whereas, some of said exhibits contain notations in the handwriting of various persons which both parties believe should be certified directly to the United States Circuit Court of Appeals for the Ninth Circuit from the District Court for the purposes of this appeal; and

“Whereas, both the appellant and appellee desire to avoid the expense of copying all of said exhibits bodily in the bill of exceptions;

“Now, Therefore, it is hereby stipulated and agreed by and between the appellant, William Morris, and the appellee, United States of America by and through their respective attorneys, subject nevertheless, to the approval of the United States Circuit Court of Appeals for the Ninth Circuit as follows:

“1. That each and all of the hereinafter mentioned and designated exhibits in evidence which are herein referred to respectively by the numbers and letters given them by the Clerk of said United States District Court at the time of the trial herein may be deemed by reference to be incorporated in the bill of exceptions, both generally and specifically where and whenever references are made to them by such numbers and letters in the body and context of said bill of exceptions to the same extent and purport as though each and all of said exhibits were fully set forth word for word and figure for figure in said bill of exceptions. [44]

“2. That the said District Court may in settling the said bill of exceptions include therein a copy of this stipulation in lieu of including therein either in substance or in full copies of each and all of the hereinafter designated exhibits in evidence, and that thereupon each of said exhibits shall be deemed to be included in said bill of exceptions to the same effect and purport as though each and all of said exhibits were fully set forth therein as aforesaid.

"3. That the exhibits to be included are as follows:

"Government's Exhibits:

"No. 1 for identification

" 2 " "

" 3 " "

" 4 " "

" 5 " "

" 6 " "

" 7 " "

" 8 " "

" 9 " "

"Defendant's Exhibits:

A

B

C

"4. That the United States District Court, in and for the Southern District of California, Central Division may make an order that all of the foregoing designated exhibits be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and for the safekeeping, transportation and return thereof at the cost of the appellant to be paid to the District Court upon demand.

"5. This stipulation in nowise constitutes a waiver of any objections and exceptions to the introduction of any exhibits by the District Court. [45]

"Dated: This 14th day of March, 1945.

"CHARLES H. CARR,
United States Attorney

"By Ernest A. Tolin
Assistant United States Attorney
"Attorneys for Appellee

"MARIO PERELLI-MINETTI and
E. O. LEAKE & J. J. LEAKE

By E. O. Leake

"Attorneys for Appellant

"It Is So Ordered.

"Dated: This day of March, 1945.

.....
"Judge of United States Circuit Court of Appeals.
for Ninth Circuit."

Conclusion

Inasmuch as the matters above set forth do not fully appear in the record and in the judgment roll, the defendant William Morris tenders this, his Bill of Exceptions, and prays that the same may be signed and approved by the Honorable Leon R. Yankwich, Judge of this court.

Dated: This 13th day of March, 1945.

MARIO PERELLI-MINETTI and
E. O. LEAKE & J. J. LEAKE

By E. O. Leake

Attorneys for Defendant [46]

The foregoing Bill of Exceptions has been examined and is approved.

Dated: This 14 day of March, 1945.

CHARLES H. CARR,
United States Attorney

By Ernest A. Tolin

Assistant United States Attorney

Attorneys for the Government—Plaintiff

The foregoing Bill of Exceptions, together with exhibits therein mentioned and made a part hereof by stipulation, contains all of the evidence adduced at the trial of this cause and correctly shows the various proceedings during the trial as well as subsequent thereto. The same being true and correct, it is accordingly settled and allowed as a true bill of exceptions in this cause.

Dated: This 14th day of March, 1945.

LEON R. YANKWICH

Judge of the United States District Court

Received copy of the within Engrossed Bill of Exceptions this day of March, 1945. Charles H. Carr, United States Attorney, by, Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 14, 1945. [47]

[Endorsed]: No. 10967. United States Circuit Court of Appeals for the Ninth Circuit. William Morris, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed March 26, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the
Ninth Circuit

No. 10967

WILLIAM MORRIS,

Appellant,

-vs-

UNITED STATES OF AMERICA,

Appellee.

STIPULATION

Whereas, the Government's and defendant's exhibits in evidence in the above-entitled action which are on file in the office of the clerk of the United States District Court of California, Southern District, Central Division, are in many instances very difficult to reproduce either by type-writing or by printing and would tend to make the transcript of the record on appeal voluminous and bulky; and

Whereas, the exhibits contain matters which both parties desire the court to see in their original form; and

Whereas, some of said exhibits contain notations in the handwriting of various persons which both parties believe should be certified directly to the United States Circuit Court of Appeals for the Ninth Circuit from the District Court for the purposes of this appeal; and

Whereas, both the appellant and appellee desire to avoid the expense of copying all of said exhibits bodily in the bill of exceptions;

Now, Therefore, it is hereby stipulated and agreed by and between the appellant, William Morris, and the appellee, United States of America by and through their respective attorneys, subject nevertheless, to the approval of the United States Circuit Court of Appeals for the Ninth Circuit as follows:

1. That each and all of the hereinafter mentioned and designated exhibits in evidence which are herein referred to respectively by the numbers and letters given them by the clerk of said United States District Court at the time of the trial herein may be deemed by reference to be incorporated in the bill of exceptions, both generally and specifically where and whenever references are made to them by such numbers and letters in the body and context of said bill of exceptions to the same extent and purport as though each and all of said exhibits were fully set forth word for word and figure for figure in said bill of exceptions.

2. That the said District Court may in settling the said bill of exceptions include therein a copy of this stipulation in lieu of including therein either in substance or in full copies of each and all of the hereinafter designated exhibits in evidence, and that thereupon each of said exhibits shall be deemed to be included in said bill of exceptions to the same effect and purport as though each and all of said exhibits were fully set forth therein as aforesaid.

3. That the exhibits to be included are as follows:

Government's Exhibits:

No. 1 for identification

” 2 ” ”

” 3 ” ”

” 4 ” ”

” 5 ” ”

” 6 ” ”

” 7 ” ”

” 8 ” ”

” 9 ” ”

Defendant's Exhibits:

A

B

C

4. That the United States District Court, in and for the Southern District of California, Central Division may make an order that all of the foregoing designated exhibits be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and for the safekeeping, transportation and return thereof at the cost of the appellant to be paid to the District Court upon demand.

5. This stipulation in nowise constitutes a waiver of any objections and exceptions to the introduction of any exhibits by the District Court.

Dated: This 14th day of March, 1945.

CHARLES H. CARR,
United States Attorney

By Ernest A. Tolin
Assistant United States Attorney
Attorneys for Appellee

MARIO PERELLI-MINETTI and
E. O. LEAKE & J. J. LEAKE

By E. O. Leake
Attorneys for Appellant

It Is so Ordered.

Dated: This 26th day of March, 1945.

CURTIS D. WILBUR,
Judge of United States Circuit Court of Appeals,
for Ninth Circuit

[Endorsed]: Filed Mar. 26, 1945. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

POINTS ON WHICH APPELLANT INTENDS TO
RELY ON APPEAL AND DESIGNATION OF
PARTS OF THE RECORD WHICH APPEL-
LANT BELIEVES NECESSARY FOR A CON-
SIDERATION THEREOF (Rule 19).

In conformity with the provision of subdivision 6 of Rule 19 of Rules of Practice of the United States Circuit Court of Appeals for the Ninth Circuit, Appellant William Morris sets out:

I.

Point on Which Appellant Intends to Rely on Appeal:
The points on which appellant William Morris intends to rely on appeal are as follows:

1. Each and every assignment of error set out by appellant William Morris in the document designated "Assignments of Error" filed by said appellant.

II.

Designation of Parts of Record Which Appellant Believes Necessary for a Consideration Thereof:

1. For the consideration of the points upon which appellant intends to rely upon appeal, it is designated that the entire record as certified to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit by the Clerk of the United States District Court *of Appeal*

for the Southern District of California, Central Division
be printed.

Dated: This 16th day of March, 1945.

MARIO PERELLI-MINETTI and
E. O. LEAKE & J. J. LEAKE

By E. O. Leake

Attorneys for Appellant

Received a copy of the within Points on Which Appel-
lant Intends to Rely on Appeal and Designation of Parts
of the Record which Appellant Believes Necessary for a
Consideration Thereof this day of March, 1945.
Charles H. Carr, United States Attorney, by Mary Went-
worth.

[Endorsed]: Filed Mar. 20, 1945. Paul P. O'Brien,
Clerk.

No. 10967

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM MORRIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

MORRIS LAVINE,

620 Bartlett Building, Los Angeles 14, California,

MARIO PERELLI-MINETTI,

704 South Spring Street, Los Angeles 14, California,

Attorneys for Appellant.

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No. 10967

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM MORRIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

*To the Honorable Ninth Circuit Court of Appeals of the
United States of America:*

This is an appeal from the District Court of the United States, Southern District of California, Central Division, of a conviction of the appellant in two counts of an information charging the defendant with violation of the Emergency Price Control Act of 1942, and certain regulations allegedly issued pursuant thereto.

Jurisdiction.

Jurisdiction is conferred by Title 28, Section 225. The appellant was informed against on the 5th day of October, 1944, charging him with four counts of violation of the Emergency Price Control Act of 1942 as amended (Pub. Law 421, 77th Congress, 2d Sess., 56 Stat. 23), and Section 1351.1405(g) of Maximum Price Regulation 292

as amended, 8 Federal Register 135 and 543, allegedly promulgated pursuant to Section 202 of the Emergency Price Control Act of 1942, and violation of Maximum Price Regulation 292 as amended.

Judgment was pronounced against the defendant on Counts I and II, on January 8, 1945, by Judge Leon R. Yankwich. Notice of appeal was duly and regularly filed January 9, 1945, pursuant to the authority of Title 28, Section 225, U. S. Codes, and to the Emergency Price Control Act of 1942, Publ. 421, 77th Congress, 2d Session, 56 Stat. 23, January 30, 1942. [R. 36, 37, 38, 39.]

Short Statement of Facts.

The appellant was informed against on October 5, 1944, by the District Attorney in a complaint verified by F. Carson Kagy, charging in Count I that the defendant violated the provisions of the Emergency Price Control Act of 1942 as amended, in that he did knowingly, willfully, and unlawfully, make a false entry in a material respect in Morris Brothers Fruit Company's copy of a statement showing the sale to Aldrich & Company of 14 South Watermarket, Chicago, Illinois, of 582 boxes of oranges for the price of \$4.50 per box, whereas the actual price charged for the sale of said oranges was an average of \$5.50 per box, which fact as to the price charged for said sale of said oranges was known to the defendant at the time of said entry and said entry was false at the time of making said record, and said record was a document required to be kept under the provisions of Section 1351.1405(g) of Maximum Price Regulation 292, as amended, 8 Federal Register 135 and 8 Federal Register 543, which was promulgated pursuant to the provisions of Section 202 of the Emergency Price Control Act of 1942 as amended.

Count II is a copy in every detail of Count I, except that the concluding language, beginning "contrary to the form of the statute" substitutes "[19]" for "[18]" as the precise subdivision of the amended Act of 1942, alleged to have been violated. Count II charged that on the same date the defendant made a false entry in a material respect in Morris Brothers Fruit Company's copy of a statement showing a sale to Aldrich & Company of 582 boxes of oranges for the sum of \$4.50 per box. During the trial of the case, after the jury was sworn, Count I of the information was amended to insert the words "that maximum Price Regulation 292 as amended, which was promulgated pursuant to the provisions of Section 202 of the Emergency Price Control Act of 1942, *which regulation 292 as amended had been approved by the Secretary of Agriculture.*" (HRYJ.) The same amendment was made to Count II of the information. [R. 14, 15, 57, 58.]

William Morris and Louis Morris are copartners in the Morris Brothers Fruit Company. On October 17, Anthony Arrigo, a half partner of Aldrich & Company located in Chicago, Illinois, whose business is supplying oranges, potatoes and vegetables to hotels, restaurants and dining cars, bought a couple of cars of oranges from William Morris. [R. 69-71.] Morris gave Arrigo two statements. [Plaintiff's Ex. 2 and 3.] A young girl in the office made out the statements. Arrigo did not see whether she made any copies of the statement. The type-writing was done in a different room. [R. 71.] Arrigo said he gave Morris a cashier's check for \$1,000.00 a cashier's check for \$2,000.00, another cashier's check for \$1,000.00 and a check for \$238.00. [R. 71.] Arrigo took delivery of the one car of oranges immediately, and paid the transportation. He took delivery of the other

car at a later date and also paid the transportation on that. [R. 72.] The check for \$238.00 was written by the young lady who came from another office. Arrigo made out a check for \$164.00 himself, payable to cash. The oranges were shipped from the LaVerne Cooperative storage. There was some controversy regarding the oranges, and on Arrigo's complaint he received a refund in the sum of \$436.50 from Morris Brothers. Arrigo sent a letter along with his claim to the Morris Brothers for a refund. In his letter he said:

“Also you mention something about black market operations, on the remark that we said ‘we paid a tremendous price on oranges.’ Our remark in that letter means only that we paid the ceiling price and no more, but it is a tremendous price for such a poor quality of oranges.”

Ann L. Joseph testified that she was employed by Morris Brothers Fruit Company from June 14, 1943, to July 15, 1944, in the capacity of head bookkeeper, that she had never seen Exhibits 2 and 3 before. She was asked about the practice or custom of making out invoices. [R. 67.] Over objections, the court permitted her to answer. She said she never saw either of the statements, Exhibits 2 and 3, and she had nothing to do with making them. She said: “The accounts receivable clerk made these bills and sent them out.” [R. 69.]

L. L. Collum testified that he was employed by the American Fruit Growers, Inc., and has access to the rec-

ords of his company showing sales of oranges to Morris Brothers Fruit Company during the week commencing October 17, 1943, and he did not find any sales of oranges to Morris Brothers Fruit Company during that week.

F. S. Gunther of the Mutual Orange Distributors testified he did not sell any oranges to Morris Brothers Fruit Company during the week commencing October 17, 1943.

Earl S. Hans, employed by the California Fruit Growers Exchange, testified that a group of pink slips which he brought with the records of the California Fruit Growers Exchange showed sales to Morris Brothers Fruit Company during the week of October 17, 1943, and that on invoice 35642, the figures 10-18-43 represents the actual date of sale and the figures under the words "price per box" at the bottom of the page, "base price \$4.08," were placed there in accordance with ceiling price regulations. Louis Morris testified: he is a brother of the defendant; both are partners in Morris Brothers Fruit Company; he never saw a duplicate of plaintiff's Exhibit No. 2; it was the custom to "make these up in duplicates"; on invoices two copies are usually made [R. 65, 66]; Exhibits 2 and 3 are not invoices. He never saw any copies or originals of them; they are entirely different from invoices. [R. 66.]

"None of the oranges represented by the statements, Government's Exhibit No. 1 was ever in storage at La Verne." [R. 91.]

The foregoing witnesses were called by the plaintiff. The following consists of testimony by defendant's witnesses. The defendant, William Morris, testified that Arrigo asked him for oranges and Morris said the oranges were at La Verne in cold storage and Arrigo could go and look at them. Defendant did not say he would require \$1.25 above the ceiling. Two days later Arrigo returned, said he had seen the oranges and wanted 2 cars, and "I sold them to him for \$4.50 per box." Defendant denied ever having seen the check for \$164 [Pl. Ex. 9] and said "the girl got the checks" and made them out and deposited them, and Mr. Arrigo only paid defendant \$4.50 per box. [R. 86, 87.]

Andrew Morris, one of the partners of the Morris Brothers Company said that 4 or 5 hours after defendant introduced Arrigo to him, Arrigo returned and said, "I got to have some money and cash a check." Andrew cashed Plaintiff's Exhibits 4 and 9 for Arrigo, and gave Arrigo the cash. Andrew indorsed the checks; "I used * * * my personal money." Our business is mostly cash. William Morris was out when the checks were cashed. Andrew knew Arrigo had bought two carloads but did not know exactly how many boxes were in those cars. [R. 88, 89.] Andrew said he did "a great deal of buying for the firm," usually in cash "and, therefore, always carry a large amount of money with me." [R. 90.]

Questions Raised by This Appeal.

1. Did the trial court err in failing to instruct the jury on the statutes and regulations of the offenses for which the defendant was being tried?

2. Did the trial court err in permitting an amendment to the verified information without the authority of the verifier, and after the trial had commenced?

3. Did the information in this case fail to state an offense against the laws of the United States, where it did not allege pursuant to the provisions of the Emergency Price Control Act of 1942, as amended, Section 3, the authority and approval of the Secretary of Agriculture?

4. Did the trial court err in failing to direct the verdict because of insufficiency of the evidence to support the judgment?

5. Did the trial court err in admitting certain copies of exhibits in evidence, for which no proper foundation had been laid?

6. Did the trial court err in its refusal to give certain instructions regarding an accomplice?

Specification of Error No. 1.

The trial court erred in failing to instruct the jury on the statutes and regulations of the offenses for which the defendant was being tried. (No assignment of error.)

Specification of Error No. 2.

The trial court permitted the amendment to the information during the trial of the case. (No assignment of error.)

Specification of Error No. 3.

The trial court erred in denying the defendant's motion to quash and set aside amended information, made by this defendant on the 27th day of November, 1944, as to Counts 1, 2, 3 and 4 of said amended information, which motion was based upon the following grounds:

That the said amended information and each count thereof fails to state facts sufficient to constitute a criminal offense; that the laws, rules and regulations upon which said amended information purports to be based are arbitrary and discriminatory, unreasonable, invalid, unconstitutional and void; that it does not appear that the United States attorney in and for the Southern District of California, Central Division, has been authorized to institute the above-entitled action by the Secretary of Agriculture or that the Secretary of Agriculture did prior to the commencement of the above proceedings at any time approve the institution of the above-entitled action. That it does not appear that the maximum price alleged is in conformity with the rules and regulations of the Secretary of Agriculture or with the provisions of the Agricultural Marketing Agreement Act of 1937, as amended.

That Counts 1 and 2 of said amended information are indefinite and uncertain in that it cannot be ascertained therefrom how or in what manner the facts therein alleged were in violation of Section 1351.1405(g) of the Maximum Price Regulation 292, as amended, or were in violation of Section 205(b) of the Emergency Price Control Act, as amended.

Specification of Error No. 4.

(Assignment of Error No. 2.)

That the court erred in overruling the demurrer of defendant to Counts 1, 2, 3 and 4 of the amended information, which demurrer was based upon the following grounds and to which ruling defendant duly excepted:

(a) That said amended information fails to state facts sufficient to constitute a criminal offense.

(b) That Count 1 of said amended information fails to state facts sufficient to constitute a criminal offense.

(c) That Count 2 of said amended information fails to state facts sufficient to constitute a criminal offense.

Specification of Error No. 5.

(Assignment of Error No. 3.)

The court erred in overruling defendant's objection to the introduction of any evidence made at the opening of Government's case, which said motion was made upon the following grounds:

"Mr. Leake: If the court please, at this time I desire to make an objection to the introduction of any evidence on the ground that the information doesn't state the facts sufficient to constitute a cause of action. Following that up a little more in detail, it totally lacks any allegation bringing it within the provisions of the Price Control Act, particularly Section 3 of the Act requiring the prior approval of

the Secretary of Agriculture. That applies to all four counts.

The second point which I propose to raise is regarding the allegations of the false entry, and along about line 19 it says, 'and said record . . . referring to this information . . . was a document . . .'

The Court: Let me look at it. Where is it?

Mr. Leake: Line 19. After reciting 'making a false entry,' it says: 'and said record was a document required to be kept under the provisions of Section 1351.1405(g) of Maximum Price Regulation 292, as amended,' and so forth.

Now, the section referred to provides as follows:

'Every intermediate seller selling citrus fruits shall:

'(1) *Make and preserve for examination* by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, remains in effect, *records* of the same kind as he has customarily kept *relating to the prices which he charges* for each item of citrus fruits after the effective date of this regulation, and, in addition, *records showing as precisely as possible*, the basis upon which he determined maximum prices for each item.' "

(After a brief discussion of the objections, the jury was excused and the argument proceeded in the absence of the jury.)

The objections of defendant to the introduction of evidence was by the court overruled, whereupon the following proceedings were had: The defendant duly excepted to the said ruling.

Specification of Error No. 6.

(Assignment of Error No. 4.)

The court erred in allowing and admitting into evidence Government's Exhibit No. 1, being a group of invoices, the first document of which bears the number 35642 relating to the alleged sale of oranges by California Fruit Growers Exchange to Morris Brothers Fruit Company. That defendant objected to the introduction of said Exhibit No. 1 on the ground that no proper foundation had been laid for its introduction. Defendant's objections were overruled and defendant duly excepted.

The only foundation for the admission of said Exhibit No. 1 consisted of the testimony of Earl S. Hans, which was in substance as follows:

I am cashier and auditor for California Fruit Growers Exchange and have been so employed since July of 1921. I have brought with me records of the sale of oranges to Morris Brothers Fruit Company by California Fruit Growers Exchange during the week commencing October 17, 1943. These records were kept by the clerk in the ordinary course of business and as a part of the ordinary and regular records. They are kept by one of my assistants under my direction.

Specification of Error No. 7.

(Assignment of Error No. 5.)

The court erred in overruling the objection of defendant to the testimony of the witness Ann L. Josephs, a former employee of Morris Brothers Fruit Company, relative to a practice or custom of said company in making up their statements. Said testimony being as follows:

“Question by Mr. Tolin: Did the company have a practice or custom of making these out or was just a single one made, were they made in duplicate or triplicate or what?

Mr. Leake: I will object to that on the ground that it is irrelevant, incompetent and immaterial.

The Court: Well, I think it is admissible. She was head bookkeeper. Go ahead.

Mr. Leake: She has stated she never saw these before.

The Court: It doesn't make any difference. He is asking about a similar document. Go ahead.”

To which ruling defendant duly excepted.

The substance of the testimony of the witness was as follows:

Referring to Government's Exhibits 2 and 3 for identification, we made these out in duplicate only for shipment on cars. I can tell from the wording that they represent shipments on cars. When a car of fruit was sent out, we were notified from the downstairs office. They told us how many boxes of fruit would be sent at such and such a price. We made out triplicate copies of bills of lading and sent one to the customer with a statement of this kind.

Specification of Error No. 8.

(Assignment of Error No. 6.)

The court erred in overruling the objection of defendant and in admitting into evidence Government's Exhibits 2 and 3, being copies of statements produced by the witness Anthony Arrigo as follows:

"Mr. Tolin: I offer in evidence Exhibits No. 2 and No. 3, for identification.

Mr. Leake: To which we object on the grounds that Exhibits 2 and 3 are incompetent, irrelevant and immaterial.

The Court: Let me see this, are those the so-called invoices or statements?

Mr. Leake: Statements.

Mr. Tolin: He testified he received them from the defendant.

The Court: Objection overruled. They may be received in evidence, marked with the numbers that they already have."

To which ruling defendant duly excepted.

Specification of Error No. 9.

(Assignment of Error No. 7.)

The court erred and abused its discretion in denying defendant's motion for a directed verdict as to Counts 1 and 2 and for a dismissal as to Counts 1 and 2 of the amended information at the close of the Government's case based on the grounds that the evidence adduced by the Government was wholly insufficient to establish the commission of the offenses charged in each of said counts. The defendant duly excepted to the ruling of the court on said motions.

Specification of Error No. 10.

(Assignment of Error No. 8.)

The court erred and abused its discretion in denying defendant's motion for a directed verdict and for a motion to dismiss as to counts 1 and 2 of the amended information at the close of the evidence. Said motion was made and based upon the grounds that the evidence introduced was wholly insufficient to establish a commission of the offense charged in each of said counts 1 and 2.

The defendant duly excepted to the ruling of the court on said motions.

Specification of Error No. 11.

(Assignment of Error No. 9.)

The court erred in refusing to give the following instruction proposed and offered by defendant, to which refusal the defendant within the time and in the manner prescribed by law duly excepted.

Defendant's Proposed Instruction No. 3.

An accomplice is one who aids, abets, or participates in the commission of a crime and is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

Specification of Error No. 12.

(Assignment of Error No. 10.)

The court erred in refusing to give the following instruction proposed and offered by defendant, to which refusal the defendant within the time and in the manner prescribed by law duly excepted.

Defendants' Proposed Instruction No. 4.

One who buys at a price above the maximum price fixed by the Rules and Regulations of the office of Price Administrator is equally guilty with one who sells above such prices and is an accomplice in the commission of the crime which may result from such transaction.

Specification of Error No. 13.

(Assignment of Error No. 11.)

The court erred in refusing to give the following instruction proposed and offered by defendant, to which refusal the defendant in the time and in the manner prescribed by law duly excepted.

Defendant's Proposed Instruction No. 5.

You are instructed that the witness, Anthony Arrigo, is by his own testimony an accomplice of the defendant, William Morris, in this action.

Specification of Error No. 14.

(Assignment of Error No. 12.)

The court erred in refusing to give the following instruction proposed and offered by defendant, to which refusal the defendant within the time and in the manner prescribed by law duly excepted.

Defendant's Proposed Instruction No. 6.

The testimony of an accomplice, coming from a polluted source, should be received with caution and distrust and you should not place too much reliance thereon unless the same is corroborated by other reliable creditable testimony.

Specification of Error No. 15.

(Assignments of Error Nos. 14 and 15.)

Counts 1 and 2 of the amended information constitute a splitting of one offense into two offenses contrary to law.

The evidence adduced by the Government conclusively shows that the matters alleged in Counts 1 and 2 of the amended information constitute but a single offense.

ARGUMENT.

I.

The Trial Court Erred in Failing to Instruct the Jury on the Offenses for Which the Defendant Was Being Tried. (No Assignment of Error on This Ground.)

Although there was no assignment made in respect to the failure of the court properly to instruct the jury, this court has decided that it is the duty of the trial court to give proper instructions on the subject matter of the trial.

Corson v. U. S., 147 Fed. (2d) 542.

The Supreme Court of the United States has held that it is the duty of the trial court itself to give proper instructions on the only subject matter on trial.

Screws v. U. S., 89 L. Ed. 1029.

The only reference in the case to the statute under which the appellant was being tried is contained in the instructions on page 96, as follows:

“The offense with which the defendant is charged is violation of the Price Control Act of 1942.”

The only reference to the regulations involved is contained in the instructions on page 99, reading as follows:

“The court instructs you that the regulation under which this case arose, Maximum Price Regulation 292, was promulgated by the Price Administrator on December 31, 1942, to become effective January 11, 1943, and was duly approved by the Secretary of Agriculture before its promulgation, and that all this was done pursuant to the authority granted by the

Congress of the United States in the Emergency Price Control Act of 1942, as amended.

“The regulation was duly published in Volume 8 of Federal Register, pages 135, 138, under date of January 5, 1943.”

What the statute said or what the regulation said is not told to the jury, and neither the court, counsel, nor jury, could know from the instructions given upon what charge the defendant was being tried. We think that this error alone, just as in the *Corson* case (tried by the same Judge), is grounds for the reversal of the judgments in this case.

II.

The Court Erred in Overruling the Demurrer of Defendant to Counts 1 and 2 of the Amended Information Which Demurrer Was Based Upon the Following Grounds and to Which Ruling Defendant Duly Excepted:

- (a) That Said Amended Information Fails to State Facts Sufficient to Constitute a Criminal Offense.
- (b) That Count 1 of Said Amended Information Fails to State Facts Sufficient to Constitute a Criminal Offense.
- (c) That Count 2 of Said Amended Information Fails to State Facts Sufficient to Constitute a Criminal Offense.

At the outset of the trial, after the jury was impanelled, the court permitted the amendment of the verified information, without the consent of the defendant, and without the verification of the person who swore to the in-

formation. While an information that is filed on oath of the District Attorney might be amended, where the information is based upon the oath of another it cannot be amended in the Federal Court without the consent of the person who verified the oath. To do so would be to proceed on an information different than that filed and upon which plea was entered. To proceed on such information is not to proceed in orderly fashion and according to due process of law.

Ex parte Bain, 121 U. S. 1, 30 L. Ed. 849.

In this case, the information was filed upon the verification of F. Carson Kagy, and was in the following language:

"State of California, County of Los Angeles, United States of America—ss.

F. Carson Kagy, being first duly sworn, upon oath deposes and says:

That he is an employee of the United States Government, to-wit, an investigator for the Office of Price Administration, an agency of the United States Government; that in the course of his duty as investigator for the Office of Price Administration, he made an investigation of the matters set forth and mentioned in the above and foregoing information against William Morris; that he has read the above and foregoing information and knows the contents thereof and that the matters set forth therein are true to the best of his knowledge and belief.

F. CARSON KAGY.

Subscribed and sworn to before me this 2d day of October, 1944.

NANCY J. VILEY,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires December 22, 1946."

During the trial, and without the consent of Mr. Kagy, the information as thus verified was amended by the addition of the words therein set out. The defendant was not re-arraigned upon the amended information and no plea was taken nor was there any formal opportunity to plead or to object thereto, and where the information is verified by an individual, to permit the amendment of the information in the middle of the trial, without the consent of the individual who verified it, is similar to a change in the verified indictment, which the court has held "deprived the court of the power of proceeding to try the petitioner and sentence him to the imprisonment provided for in the statute."

In *Ex parte Bain*, the court, in quoting from *State v. Sexton*, 3 Hawks Law and Equity, N. C. 184, said:

"Being the finding of a jury upon oath, the court cannot amend without the concurrence of the grand jury by whom the bill is found."

and so here the information, having been founded on the oath of F. Carson Kagy, could not be amended without the concurrence of the person upon whose oath the information was secured.

Specifications of Error Nos. 3 and 4.

It was essential to the jurisdiction of the court that the Secretary of Agriculture, prior to the commencement of the suit, approve the action and the maximum price regulation. These defects were jurisdictional.

Emergency Price Control Act of 1942, as amended by the Stabilization Act of 1944.

Public Law 421, 77th Congress, 2d Session, 56 Stat. 23, Jan. 30, 1942, as amended October 2, 1942; 56 Stat. 767, and as amended June 30, 1944, 58 Stat. 632.

(a) The amended information failed to allege that the Government did the things provided in the Emergency Price Control Act as amended. The information was presumably brought under the Emergency Price Control Act of 1942, 56 Stat. 23, and the power of this act had expired except for the amendments provided on July 16, 1943, 57 Stat. 566, and the amendment of June 30, 1944, 58 Stat. 632. No authority is alleged in the information for the amended information.

(b) The amended information fails to set up that the Secretary of Agriculture approved the purported regulation which it was alleged was violated or that the prices were such as authorized by the Secretary of Agriculture, or that the provision of Subdivision L of Section 902, Title 50, had been established by the Administrator for any agricultural commodity after notice as required by the statute, nor is there any statement which brings the

acts within section 3 of the Emergency Price Control Act (Section 903, Title 50).*

Specification of Error No. 5.

(Assignment of Error No. 3)

The court erred in overruling defendant's objection to the introduction of any evidence made at the opening of Government's case, which said motion was made upon the following grounds:

"Mr. Leake: If the court please, at this time I desire to make an objection to the introduction of any evidence on the ground that the information doesn't

*Emergency Price Control Act, Title 50, Section 903:

"(a) No maximum price shall be established or maintained for any agricultural commodity below the highest of any of the following prices, as determined and published by the Secretary of Agriculture: (1) 110 per centum of the parity price for such commodity, adjusted by the Secretary of Agriculture for grade, location, and seasonal differential, or, in case a comparable price has been determined for such commodity under subsection (b), 110 per centum of such comparable price, adjusted in the same manner, in lieu of 110 per centum of the parity price so adjusted; (2) the market price prevailing for such commodity on October 1, 1941; (3) the market price prevailing for such commodity on December 15, 1941; or (4) the average price for such commodity during the period July 1, 1919 to June 30, 1929.

(b) For the purposes of this Act, parity prices shall be determined and published by the Secretary of Agriculture as authorized by law. In the case of any agricultural commodity other than the basic crops corn, wheat, cotton, rice, tobacco, and peanuts, the Secretary shall determine and publish a comparable price whenever he finds, after investigation and public hearing, that the production and consumption of such commodity has so changed in extent or character since the base period as to result in a price out of line with parity prices for basic commodities.

(c) No maximum price shall be established or maintained for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to producers of such agricultural commodity

state the facts sufficient to constitute a cause of action. Following that up a little more in detail, it totally lacks any allegation bringing it within the provisions of the Price Control Act, particularly Section 3 of the Act requiring the prior approval of the Secretary of Agriculture. That applies to all four counts.

The second point which I proposed to raise is regarding the allegations of the false entry, and

a price for such agricultural commodity equal to the highest price therefor specified in subsection (a).

(d) Nothing contained in this Act shall be construed to modify, repeal, supersede, or affect the provisions of the "Agricultural Marketing Agreement Act of 1937, as amended (Title 7, Sections 601, 602, 608a-608c, 608d, 608e, 610, 612, 614, 624, 671-674), or to invalidate any marketing agreement, license, or order, or any provision thereof or amendment thereto, heretofore or hereafter made or issued under the provisions of such Act.

(e) Notwithstanding any other provision of this or any other law, no action shall be taken under this Act (sections 901-946 of this Appendix) by the Administrator or any other person with respect to any agricultural commodity without the prior approval of the Secretary of Agriculture; except that the Administrator may take such action as may be necessary under section 202 and section 205 (sections 922 and 925 of this Appendix) to enforce compliance with any regulation, order, price schedule or other requirement with respect to an agricultural commodity which has been previously approved by the Secretary of Agriculture.

(f) No provision of this Act or of any existing law shall be construed to authorize any action contrary to the provisions and purposes of this section.

(g) Whenever a maximum price has been established, under this Act (sections 901-946 of this title) or otherwise, with respect to any fresh fruit or any fresh vegetable, the Administrator from time to time shall adjust such maximum price in order to make appropriate allowances for substantial reductions in merchantable crop yields, unusual increases in costs of production, and other factors which result from hazards occurring in connection with the production and marketing of such commodity. Jan. 30, 1942, c. 26, Title I, Section 3, 56 Stat. 27, as amended June 30, 1944, c. 325, Title I, Section 103, 58 Stat. 636."

along about line 19 it says, 'and said record . . . referring to this information . . . was a document . . .'

The Court: Let me look at it. Where is it?

Mr. Leake: Line 19. After reciting 'making a false entry,' it says: 'and said record was a document required to be kept under the provisions of Section 1351.1405(g) of Maximum Price Regulation 292, as amended,' and so forth.

Now, the section referred to provides as follows:

'Every intermediate seller selling citrus fruits shall:

(1) Make and preserve for examination by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, remains in effect, records of the same kind as he has customarily kept relating to the prices which he charges for each item of citrus fruits after the effective date of this regulation, and, in addition, records showing as precisely as possible, the basis upon which he determined maximum prices for each item.' "

We reiterate this specification of error and the grounds urged, but believe it is more properly to be urged on the ground that the amended information fails to state a public offense, in that the act does not require such a document to be preserved.

Specification of Error No. 6.

(Assignment of Error No. 4.)

The court erred in allowing and admitting into evidence Government's Exhibit No. 1, being the group of invoices, the first document of which bears the number 35642 relating to the alleged sale of oranges by California Fruit Growers Exchange to Morris Brothers Fruit Company. Defendant objected to the introduction of said Exhibit No. 1 on the ground that no proper foundation had been laid for its introduction. Defendant's objections were overruled and defendant duly excepted.

The only foundation for the admission of said Exhibit No. 1 consisted of the testimony of Earl S. Hans, which was in substance as follows:

I am cashier and auditor for California Fruit Growers Exchange and have been so employed since July of 1921. I have brought with me records of the sale of oranges to Morris Brothers Fruit Company by California Fruit Growers Exchange during the week commencing October 17, 1943. These records were kept by the clerk in the ordinary course of business and as a part of the ordinary and regular records. They are kept by one of my assistants under my direction.

The lack of foundation for the introduction of these slips is so patent that their admission without proof of further foundational facts is surprising.

The Court erred in admitting Exhibit No. 1, as two things were necessary under Title 28, Section 695, to lay the foundation for the admission of this Exhibit:

1. That it was made in the regular course of business:
2. That it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event, or within a reasonable time thereafter.

Title 28, Section 695, United States Codes.

1. Here the evidence did not show that the records were *made* in the regular course of business.
2. It did not show that it was the regular course of such business to make such invoice.

Palmer v. Hoffman, 318 U. S. 109, 87 L. Ed. 645.

The evidence in this case failed to show, first, that it was made by the California Fruit Growers Exchange, and, second, that it was the regular course of such business to make the particular type of invoice.

“The first general requirement is that the entry must have been made in the *regular course of business*.”

5 *Wigmore, supra*, Sec. 1523.

Incident to this rule:

“The entry offered must of course be a part of a *series of entries or reports*, not a casual, isolated one, because the trustworthiness of the entries by reason of ‘powerful motives to accuracy’ which result from ‘systematically and habitually’ recording ‘a course of business dealings’ which makes admissible the record

of a part of a 'series of entries or reports is lacking in the entry of a single isolated matter."

5 *Wigmore, supra*, Secs. 1522 and 1525.)

The instant sales slips merely have to do with two sales made at the same time and constitute a single isolated transaction, and this element of the necessary foundation was not proved, and probably could not have been.

Specification of Error No. 7.

(Assignment of Error No. 5.)

The court erred in overruling the objection of defendant to the testimony of the witness Ann L. Josephs, a former employee of Morris Brothers Fruit Company, relative to a practice or custom of said company in making up their statements. Said testimony being as follows:

"Q. (By Mr. Tobin): Did the company have a practice or custom of making these out or was just a single one made, were they made in duplicate or triplicate or what?

Mr. Leake: I will object to that on the ground that it is irrelevant, incompetent and immaterial.

The Court: Well, I think it is admissible. She was head bookkeeper. Go ahead.

Mr. Leake: She has stated she never saw these before.

The Court: It doesn't make any difference. He is asking about a similar document. Go ahead."

To which ruling defendant duly excepted.

The substance of the testimony of the witness was as follows:

Referring to Government's Exhibits 2 and 3 for identification we made these out in duplicate only for shipment on cars. I can tell from the wording that they represent shipments on cars. When a car of fruit was sent out, we were notified from the downstairs office. They told us how many boxes of fruit would be sent at such and such a price. We made out triplicate copies of bills of lading and sent one to the customer with a statement of this kind.

She further testified concerning the custom of the office as to the disposition customarily made of the copies of bills of lading that the "first one was kept by the railroad, but the other was sent to the customer with the statement attached." [R. 68.]

On cross-examination the witness testified:

"I never saw either one of the statements, Exhibits 2 and 3 for identification. I did not make them out. The accounts receivable clerk made these bills and sent them out. I had nothing to do with making the bills out. I do not know how many copies were made of these particular bills, Exhibits 2 and 3 for identification." [R. 70.]

The gist and principal element in the charge set forth in Count 1 is the averment that William Morris "did knowingly * * * make an entry false in a material respect in Morris Bros. Fruit Co.'s copy of a statement."

The mere fact that a false entry appears in a copy of a statement received by Aldrich & Company is no evidence that an original of said copy was made and kept by Morris Brothers Company.

It is true that these Exhibits appear to be carbon copies.

However, that fact is shorn of all significance to permit an inference that Morris Brothers retained possession of the original because Miss Joseph testified that "the first one was kept by the railroad" and the second went to the customer. [R. 68.]

Hence the sole and single item of evidence, or rather, of testimony, in the record, which necessarily was the basis of the jury's implied finding that Morris Brothers ever had documents such as Government's Exhibits 2 and 3 is the head bookkeeper's statement as to what was customarily done.

Such evidence is generally held to be inadmissible as proof of a particular act even in civil cases. Evidence of *general custom and usage* in a particular business or trade is admissible in certain types of cases upon the issues of negligence and contributory negligence. However, "In any event, evidence of custom, in order to be admissible, must refer to a general custom rather than to the custom of the person whose negligence is charged."

38 *Am. Jur.*, p. 1016 and cases there cited.

Green v. Shaw, 136 S. C. 56, 134 S. E. 226, 48 A. L. R. 243 (1926).

The opinion quotes many decisions and other standard authorities in support of its decision, among which is "22 *Am. & Eng. Enc. Law*, 2nd Ed., 809."

Again it is said in *American Jurisprudence* (Vol. 20, p. 310):

"According to the weight of authority, however, evidence of the general habits of a person is not ad-

missible for the purpose of showing his conduct upon a specific occasion.”

In the instant case it is alleged by the Government's accusation that Morris Brothers had a certain document and record which it was required to keep by a certain Price Regulation, and that the defendant made a false entry in said document.

The sole purpose of the testimony as to habit and custom was to create an inference that Morris Brothers had copies of Government's Exhibits 2 and 3 without which proof there could have been no falsification of such documents by the defendant.

Hence Ann Joseph's testimony as to the custom and practice in the office where she was bookkeeper was properly challenged by the objection that it was incompetent, irrelevant and immaterial and the court's error in admitting the evidence was highly prejudicial.

Testimony as to the habits and character of a grantor are irrelevant and inadmissible as tending to show the probability that he had transferred land in dispute in support or a recital in a deed that such transfer had been made. (*Turnalty v. Temple*, 99 C. C. A. 375, 176 Fed. 67.)

The appellate court said, “The evidence was remote and conjectural,” and it quotes *First Nat. Bk. v. Stewart*, 114 U. S. 224, 29 L. Ed. 101, as follows:

“The law requires an open and visible connection between the principal and the evidentiary facts, and the deductions from them, and does not permit a decision to be made on remote inferences.”

In the *Stewart* case the evidence which was held to have been improperly received was proof that the owner of the stock, which the bank claimed was transferred to it to apply on Stewart's obligations, was and for some time had been insolvent, and the purpose of the evidence was to corroborate the testimony of bank officers as against evidence tending to show that the stock had been deposited for safekeeping only.

In *Thompson v. Bowie*, 4 Wall. 463, 18 L. Ed. 423, evidence was permitted admission to show that the maker of a promissory note was intoxicated when he made it and that he habitually gambled when intoxicated. The purpose was to support the claim that the note was given for a gambling debt.

The reasoning as well as the rule established in the *Thompson* case is applicable herein. The court said:

"There was no direct evidence offered on the trial to impeach the consideration of the notes; but what is called circumstantial evidence, in contradistinction to direct evidence, was relied on to prove the defense. Robert Bowie, a brother of the defendant, was called by him, and allowed to testify that whenever his brother was under the influence of liquor, he had a propensity to gamble, and it is contended, as he was drunk on the morning the notes were given, and as they were in the handwriting of a professional gambler, and payable to the keeper of a gaming house, the inference is fair and reasonable that they were given for money won at play.

"Did the court err in admitting this evidence?"

"If it did err in this matter, then the judgment must be reversed, for, undoubtedly, the jury, in the formation of their verdict, must have been greatly

influenced by testimony that the general character or habit of Thomas F. Bowie was to gamble when intoxicated.

“All evidence must have relevancy to the question in issue, and tend to prove it. If not a link in the chain of proof, it is not properly receivable. Could the habit of Thomas F. Bowie to gamble, when drunk, legally tend to prove that he did gamble on the day the notes were executed? The general character and habits of Bowie were not fit subjects of inquiry in this suit for any purpose. The rules of law do not require the plaintiff to be prepared with proofs to meet such evidence. * * *

* * * He was simply endeavoring to show that his own negotiable paper was given for money lost at play; and to allow him, as tending to prove this, to give in evidence his habit to gamble when drunk, would overturn all the rules established for the investigation of truth. When trying a prisoner on an indictment, for a particular crime, proof that he has a general disposition to commit the crime is never permitted. *Phil. Ev.* 143; *State v. Field*, 14 Me. 249. If a man charged with the larceny of a horse was proved—in connection with other evidence tending to show his guilt—to be drunk on the day the horse was stolen, would any court allow the general evidence to go to the jury, that when drunk he always stole a horse? And yet, the general rules of evidence are the same in civil as in criminal cases. ‘There is no difference,’ says Abbott, Justice, ‘as to the rules of evidence between criminal and civil cases; what may be received in the one may be received in the other, and what is rejected in the one ought to be rejected in the other.’ *Rex v. Watson*, 2 Stark. 155; *Regina v. Murphy*, 8 Carr. & P. 306.

“The uniform habit of a party to loan money at usurious interest, was not considered by the Supreme Court of New York a legal foundation for a verdict establishing usury, although one usurious loan had been proved between the parties to the suit, and it was altogether probable that the case under review was of that description. *Jackson v. Smith*, 7 Cow. 719. The uniform habit of Bowie, when drunk, to gamble, is not a legal foundation for this verdict, although it is highly probable that the notes in controversy were executed by him for a gaming consideration.”

In the following cases evidence of habit was held inadmissible and incompetent :

In *Starr v. Los Angeles R. Co.*, 187 Cal. 270, 201 Pac. 599, testimony that the conductor was in the habit of talking with passengers was rejected as tending to show that he did so in the instant case.

Federal Asbestos Co. v. Zimmerman, 171 Wis. 594, 177 N. W. 881 (1920).

This decision as to the facts, resembles the instant case. Witnesses testified and described plaintiff's office custom and system in the matter of producing and mailing letters, and a copy of a certain letter was produced. The plaintiff had merely testified that he dictated the letter, but could not say that it was mailed according to the system. The opinion said that this evidence failed to show that the custom “had been followed” in “this particular instance.”

There are two important distinctions to be noted which differentiates the instant testimony from that in certain cases where evidence of habit has been held admissible.

“Although it is sufficient to prove that an addressee of a letter has received it, if it be shown that the mail matter was properly prepared and placed in the appropriate receptacle, this presumption being based upon the systematic operation of the Government’s postal service, the habit or custom of an individual delivering such mail matter under certain conditions must be testified to by the person who does the mailing.”

Gardam & Son v. Batterson, 198 N. Y. 175, 91 N. E. 371 (1910);

Cross & Co. v. Bell O. & G. Co., 129 Okla 188, 263 Pac. 1105 (1928);

Brailford v. Williams, 15 Md. 150, 159 (1859);

Birmingham News Co. v. Hoseley, 225 Ala. 45, 141 So. 689 (1932);

Pampanga Sugar Mills v. Chong Tiadpo, 49 P. I. 1003 (1926).

It seems obvious that the rule upheld in these and other similar cases is sound because the mere proof that a business concern has a plan and system which includes mailing letters when placed on someone’s desk (*Gardam* and *Brailford* cases), or upon some other contingency, greatly reduces the probability of the system having functioned in a particular transaction and renders that probability too vague and remote to take the place of evidence, primary or secondary, that the act in question was performed, since the court cannot take judicial notice that a private system functions in every detail.

In the instant case the head bookkeeper testified that she never prepared invoices or bills of lading in triplicate or filed a copy in the records of Morris Brothers. The employee whose duties involved these functions, if they were performed, did not appear and testify that she habitually carried out the plan as the head bookkeeper outlined it.

Specification of Error No. 8.

(Assignment of Error 6)

The court erred in overruling the objection of defendant and in admitting into evidence Government's Exhibits 2 and 3, being copies of statements produced by the witness Anthony Arrigo as follows:

"Mr. Tolin: I offer in evidence Exhibits No. 2 and No. 3, for identification.

Mr. Leake: To which we object on the grounds that Exhibits 2 and 3 are incompetent, irrelevant and immaterial.

The Court: Let me see this, are those the so-called invoices or statements?

Mr. Leake: Statements.

Mr. Tobin: He testified he received them from the defendant.

The Court: Objection overruled. They may be received in evidence, marked with the numbers that they already have."

To which ruling defendant duly excepted.

Without some evidence tending to show that Morris Brothers Company had a copy or the original of the copy produced by Arrigo, the fact, if it were properly proved

that Arrigo's concern received such document would be irrelevant and immaterial, because the charge is that the defendant falsified a document which was kept by the Morris Brothers Company.

It has been shown that no competent evidence to show that such document was, in fact kept by that company.

Government's Exhibits 2 and 3 were equally irrelevant and immaterial and meaningless as circumstantial evidence to prove the essential ultimate fact Morris Brothers Company had made or retained the original or copies precisely same as these exhibits, because Ann Joseph's testimony which is the only foundation for Arrigo's, was that the original bill of lading and statement was delivered to the Railroad Company. Hence Exhibits 2 and 3 may have been the only copies that were made of the respective originals to be delivered to the Railroad.

Specifications of Error Nos. 9 and 10.

(Assignments of Error Nos. 7 and 8.)

The court erred and abused its discretion in denying defendant's motion for a directed verdict as to Counts 1 and 2 and for a dismissal as to Counts 1 and 2 of the amended information at the close of the Government's case based on the grounds that the evidence adduced by the Government was wholly insufficient to establish the commission of the offenses charged in each of said counts. The defendant duly excepted to the ruling of the court on said motions.

The court erred and abused its discretion in denying defendant's motion for a directed verdict and for a motion to dismiss as to counts 1 and 2 of the amended

information at the close of the evidence. Said motion was made and based upon the grounds that the evidence introduced was wholly insufficient to establish a commission of the offense charged in each of said counts 1 and 2. The defendant duly excepted to the ruling of the court on said motions.

The Government's Evidence Is Wholly Insufficient to Prove the Offense Attempted to Be Charged in Count I.

(a)

The District Court erred in permitting the amendment to the information and in instructing the jury that the regulation had been approved by the Secretary of Agriculture. There was no evidence in the record that the Secretary of Agriculture approved of the regulation or the price schedule. [R. 13, 14; Instruction, R. 99.]*

(b)

The statute and regulations pursuant thereto did not make the keeping of false or inaccurate records a penal offense. (*U. S. v. Eaton*, 144 U. S.; *U. S. v. Grimand*, 220 U. S.)

*The court instructed the jury as follows:

"The court instructs you that the regulation under which this case arose, Maximum Price Regulation 292, was promulgated by the Price Administrator on December 31, 1942, to become effective January 11, 1943, and was duly approved by the Secretary of Agriculture before its promulgation and that all this was done pursuant to the authority granted by the Congress of the United States in the Emergency Price Control Act of 1942, as amended." [R. 99.]

(c)

The evidence in this case totally failed to show that there had been any violation of the Emergency Price Control Act of 1942 or any regulation issued pursuant thereto. There is nothing in the regulations that required the keeping or making of any invoices or making an offense out of the failure to keep correct invoices. While a statute may provide the law and regulations may be issued pursuant thereto, a crime cannot be created by administrative decree, and there is nothing in the evidence that shows any violation of any statute of the United States. For this reason, the verdict should have been directed.

* The issue as to the insufficiency of the evidence was presented in several ways during the trial.

For the present purpose the error of the Court in refusing to direct a verdict, for the defendant [R. 75], will be discussed.

The evidence is insufficient in the following respects:

1. There is no competent evidence to show that Morris Brothers ever had any statement of the sale to Aldrich & Company.
2. The evidence fails to show that, if Morris Brothers had such a statement the same was in words and figures identical with that received by Mr. Arrigo on behalf of Aldrich & Company.
3. No competent evidence was adduced to prove that William Morris prepared or directed the preparation of Aldrich & Company's invoice or personally knew its contents.

1. The only evidence concerning the alleged "statement" in Morris Brothers "copy" of "the sale to Aldrich

& Company" as set forth in Count I, is the testimony of Anthony Arrigo and Ann L. Joseph.

Neither of these witnesses claimed to have ever seen the alleged copy of any statement of this sale in the possession of William Morris or of Morris Brothers or at all.

The conclusion of the jury that such a copy ever existed is, therefore, a mere conjecture and guess.

Arrigo testified that on October 15th, 1943, he talked with William Morris about buying oranges [R. 70]; that he then went away and returned and ordered two cars of the fruit. [R. 70.]

After identifying, that is, saying, "I recognize Government's Exhibits 2 and 3," Arrigo said,

"A young girl in the office made out the statements. I did not see whether or not she made any copies of the statements. The typewriting was done in a different room." [R. 71.]

Arrigo reiterated the same testimony on cross-examination. [R. 73.]

Ann Joseph said she was employed by Morris Brothers as head bookkeeper, and had never seen Government's Exhibits 2 and 3 before. [R. 67.]

Over defense counsel's objections that the evidence "is irrelevant, incompetent and immaterial" the witness testified that the company had a custom of making out "triplicate copies of bills of lading and sent one to the customer with a statement of this kind attached. Not the first one, I mean the first one was kept by the railroad, but the other was sent to the customer with the statement attached. We kept the other with a duplicate statement

attached so that when it was paid we would mark that copy paid and put it back in the file so that we kept a permanent record of all these things. The company kept files of the bills of lading. [R. 68.]

On cross-examination Ann Joseph testified:

“By Mr. Leake:

I never saw either one of the statements, Exhibits 2 and 3 for identification. I did not make them out. The accounts receivable clerk made these bills and sent them out. I had nothing to do with making the bills out. I do not know how many copies were made of these particular bills, Exhibits 2 and 3 for identification.

Redirect Examination

By Mr. Tolin:

I know we did some big buying during October, 1943, from California Fruit Growers and Mutual Orange Distributors. I don't know whether we bought anything in that particular week, I wouldn't remember that. I only know we dealt with those concerns.

Recross-Examination

By Mr. Leake:

I know that Morris Brothers dealt with a great many smaller firms. I do not know how many.”

The gist and principal element in the charge set forth in Count I is the averment that William Morris

“did knowingly * * * make an entry false in a material respect in Morris Bros. Fruit Co's copy of a statement.”

The mere fact that a false entry appears in a copy of a statement received by Aldrich & Company is no evidence that an original of said copy was made and kept by Morris Brothers Company.

As has been shown the sole and single item of evidence in the record, which necessarily was the basis of the jury's implied finding that Morris Brothers ever had documents such as Government's Exhibits 2 and 3 is the head book-keeper's statement as to what was customarily done.

Under the preceding Specification of Error No. VII it has been shown that, as a matter of law the evidence of habit and custom admitted in this case was entirely inadmissible.

In addition to the authorities there set forth, others of the same import appear to foreclose the possibility of the use of habit and custom evidence to establish a particular act or fact having occurred or existed.

In *Green v. Shaw*, 136 S. C. 56, 134 S. E. 226, 48 A. L. R. 243 (1926), Dr Shaw was sued for damages and charged with wilful negligence in administering an X-ray.

Two other physicians were permitted to testify as to the defendant's habits, skill and care in administering X-ray. The verdict was for the defendant. On appeal a reversal was ordered, it being held that the admission of such testimony was erroneous, and so prejudicial as to require a new trial.

The opinion quotes many decisions and other standard authorities in support of its decision, among which is "22 Am. & Eng. Enc. Law, 2nd ed. 809," as follows:

"The general reputation of a physician for competency and skill is inadmissible in an action for mal-

practice, because the issue is his conduct in a particular case."

It is said in American Jurisprudence (Vol. 20, p. 310):

"According to the weight of authority, however, evidence of the general habits of a person is not admissible for the purpose of showing his conduct upon a specific occasion."

The issue in the instant case is specific and narrow. It is alleged by the Government's accusation that Morris Brothers had a certain document and record which it was required to keep by a certain Price Regulation, and that the defendant wilfully, etc., made a false entry in said record and document.

The purpose of the testimony as to habit and custom was to establish as a fact that Morris Brothers had the particular records—to show the existence of the documents, without which proof, of course, there could have been no falsification.

It is believed that no precedent which is not distinguishable can be found for the admission of evidence of habit or custom, *especially as the sole evidence*, of such a specific act or fact.

In a contempt proceeding for shadowing jurors proffered testimony to show that officers of the Department of Justice habitually engaged in this practice was held to have been properly refused, as irrelevant. (*Sinclair v. U. S.*, 279 U. S. 749, 723 L. ed. 938 (1929).)

Divine v. American Express Co., 91 Vt. 521, 101 Atl. 209 (1917).

The action was for damages for loss of goods. The alleged habit was to never receive goods without giving a receipt.

Hartsell v. Masterson, 132 Ala. 275, 31 So. 618 (1902).

The issue was whether the defendant had employed the plaintiff by the year or by the month. It was held that defendant's custom to employ by the year was irrelevant.

Missouri Cattle Loan Co. v. Great Southern L. Ins. Co., 330 Mo. 968, 52 S. W. (2d) 1.

The habit of always sending notice of nonpayment of premiums to show particular nonpayments.

Dowagiac M. Co. v. Watson, 90 Minn. 100, 95 N. W. 884.

The custom of plaintiff to send notices to endorsers to show that a particular notice was sent. And in *Mulville v. Ins. Co.*, 19 Mont. 95, 47 Pac. 651, similar evidence was offered of a habit of jumping on trains while they were moving.

The proffered evidence was held too remote and inadmissible to prove the particular acts involved in each of these cases.

In *Holcomb v. Watson Supply Co.*, 171 S. C. 110, 171 S. E. 604, a habit of walking in the middle of the road was attempted to be proved but held inadmissible to show that the deceased had done so when struck by the defendant's truck.

In *Baltimore & O. R. Co. v. Henthorne*, 73 Fed. 634, evidence of intemperate habit was excluded as proof that defendant was drunk on the occasion in question.

To the same effect are:

Edwards v. Worcester, 172 Mass. 104, 51 N. E. 447;

Com v. Rivet, 205 Mass. 464, 91 N. E. 877;

Warner v. R. Co., 44 N. Y. 465;

Cleghorn v. R. Co., 36 N. Y. 44;

Chesapeake & O. R. Co. v. Riddle, 24 Ky. L. Rep. 1687, 72 S. W. 22;

Kingston v. R. Co., 112 Mich. 40, 70 N. W. 315, 74 N. W. 230.

In *Baker v. Irish*, 172 Pa. 528, 33 Atl. 558, the defendant attempted to prove that the plaintiff had a habit of jumping out of an elevator before it stopped.

In *Federal Asbestos Co. v. Zimmerman*, 171 Wis. 594, 177 N. W. 881 (1920), witnesses testified and described plaintiffs' office custom and system in the matter of producing and mailing letters, and a copy of a certain letter was produced. The plaintiff had testified that he dictated the letter. The opinion said that the evidence failed to show that the custom "had been followed" in "this particular instance."

In the instant case the evidence fails to show that the custom was followed, and appellant contends that without some evidence to establish that fact there was a total failure of proof to show that Morris Brothers Fruit Company ever had a copy of said statement which could have been falsified as charged or at all.

As held in *First National Bank v. Stewart*, 114 U. S. 224, 29 L. ed. 101, the law requires "an open and visible connection between the principle and evidentiary fact":

otherwise no reasonable deduction is possible and if one is attempted to be drawn it must be a mere conjecture.

The reasoning in that decision and in *Thompson v. Bowie*, 4 Wall. 463, 18 L. ed. 423, previously quoted herein, and the authority of these cases, alone, should suffice to exclude the testimony of the head bookkeeper of Morris Brothers Company as to the practice in making copies of bills of lading, but who admitted that she knew nothing whatever about any copies in the instant transaction, and also, she did not know when the alleged practice began. [R. 68.]

Specifications of Error 11, 12, 13 and 14 will be considered together. They are as follows:

Specification of Error No. 11.

(Assignment of Error No. 9.)

The court erred in refusing to give the following instruction proposed and offered by defendant, to which refusal the defendant within the time and in the manner prescribed by law duly excepted.

Defendant's Proposed Instruction No. 3.

An accomplice is one who aids, abets, or participates in the commission of a crime and is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

Specification of Error No. 12.
(Assignment of Error No. 10.)

The court erred in refusing to give the following instruction proposed and offered by defendant, to which refusal the defendant within the time and in the manner prescribed by law duly excepted.

Defendant's Proposed Instruction No. 4.

One who buys at a price above the maximum price fixed by the Rules and Regulations of the Office of Price Administrator is equally guilty with one who sells above such prices and is an accomplice in the commission of the crime which may result from such transaction.

Specification of Error No. 13.
(Assignment of Error No. 11.)

The court erred in refusing to give the following instruction proposed and offered by defendant, to which refusal the defendant in the time and in the manner prescribed by law duly excepted.

Defendant's Proposed Instruction No. 5.

You are instructed that the witness, Anthony Arrigo, is by his own testimony an accomplice of the defendant, William Morris, in this action.

Specification of Error No. 14.
(Assignment of Error No. 12.)

The court erred in refusing to give the following instruction proposed and offered by defendant, to which refusal the defendant within the time and in the manner prescribed by law duly excepted.

Defendant's Proposed Instruction No. 6.

The testimony of an accomplice, coming from a polluted source, should be received with caution and distrust and you should not place too much reliance thereon unless the same is corroborated by other reliable creditable testimony.

These instructions all involve the same legal questions and principles.

The trial judge refused to give each and all of the instructions concerning accomplices and their testimony.

Since the buyer and seller are in *pari delicto*. (Bowles v. Glick Bros. Lumber Co., 146 F. (2d) 566.) If the buyer aids, abets, advises or encourages in the transaction, the making of an invoice of which is an essential part he is an accomplice and the accused is entitled to an instruction thereon. (Peo. v. Warren, 16 Cal. (2d) 103.)

(*People v. Coffey*, 161 Cal. 433; *State v. Light*, 17 Ore. 398, 21 Pac. 132.) This is the law in Oregon (*State v. Brown*, 113 Ore. 149, 231 Pac. 926); also, in Nevada (*State v. Douglas*, 26 Nev. 196, 99 Am. St. Rep. 688), in Montana (*State v. McCarthy*, 36 Mont. 226, 92 Pac. 521), in Idaho (*State v. Gillum*, 39 Idaho 457), and in Arizona (Ariz. P. C. Sec. 1051).)

The Supreme Court of the United States said:

"It is undoubtedly the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them."

It was so declared in *Holmgren v. United States*, 217 U. S. 509, 54 L. ed. 861, and the Court implied that if any proper request for such an instruction had been requested the error might have been held to be cause for reversal in that case.

Again in *Berger v. United States* in reversing the conviction the accused, principally on the ground of misconduct of the prosecutor, the high court characterized the Government's case as "weak—depending, as it did upon the testimony of Katz, an accomplice with a long criminal record." Surely, no Court can say, without self-stultification, that an accomplice's testimony is entitled to full credit, and in fairness to the accused should be received without caution. To do so is for the Court to make itself blind to a fact which everyone else, in Court and outside of court knows.

In *Dahly v. United States*, 50 F. (2d) 37, a reversal of the conviction of Dahly and another was adjudged. It was said that whether credence should be given the testimony of Smith, an accomplice, upon which the Prosecutor chiefly relied was "open to grave doubt," and the final reason given was, "his veracity as a witness was completely destroyed by *his own testimony* and by the *admission of his counsel*." (Emphasis added.)

Smith's testimony, among other matters, showed that he was an accomplice, which was admitted by the prosecutor.

McGinnis v. United States and Sykes v. United States.

In *McGinnis v. United States*, 256 Fed. 621, and in *Sykes v. United States*, 204 Fed. 909, it was held that where a conviction is sought on the uncorroborated testimony of an accomplice such testimony is not entitled to full credit.

In the *Sykes* case it was held that other evidence than that of an accomplice identifying and connecting the accused with the crime as one of its perpetrators is essential to constitute such a corroboration of the accomplice as renders it safe or prudent to convict, citing *State v. Chyo Chiagk*, 90 Mo. 415; *United States v. Ybanez* (cc), 53 Fed. 536; *Commonwealth v. Hayes*, 140 Mass. 366; *Commonwealth v. Holmes*, 127 Mass. 424, 34 Am. Rep. 391 and *McNeally v. State*, 5 Wyo. 59.

Wherefore appellant prays for reversal of the judgments.

Respectfully submitted,

MORRIS LAVINE,

MARIO PERELLI-MINETTI,

Attorneys for Appellant.

No. 10967

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM MORRIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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JAMES M. CARTER,
Assistant United States Attorney.

WILLIAM STRONG,
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FILED

DEC 3 - 1945

PAUL P. O'BRIEN,
CLERK

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No. 10967

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM MORRIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Jurisdictional Statement.

The United States District Court for the Southern District of California, Central Division, had jurisdiction of the cause under Section 205(b) of the Emergency Price Control Act of 1942, as amended, 56 Stat. 23 (50 U.S.C. App. 901 *et seq.*) and Section 24 of the Judicial Code (28 U.S.C. 41(2)). The offenses charged in the information were committed in the City of Los Angeles, State of California, within the jurisdiction of the District Court. This Court has jurisdiction of the appeal under Section 128 of the Judicial Code (28 U.S.C. 225).

Statutes and Regulations Involved.

Sections 202 and 205(b) of the Emergency Price Control Act of 1942, as amended, 56 Stat. 23 (50 U.S.C. App. 901 *et seq.*) provide in part:

Section 202 (50 U.S.C. App. 922):

“Investigations, records; reports

* * * * *

“(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpoena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.” (202b)

Section 205(b) (50 U.S.C. App. 925):

“Enforcement

* * * * *

“(b) Any person who willfully violates any provision of section 4 of this Act [section 904 of this Appendix], and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202 [sections 902 or 922 of this Appendix], shall, upon conviction thereof, be sub-

ject to a fine of not more than \$5,000, or to imprisonment for not more than two years in the case of a violation of section 4(c) [section 904(c) of this Appendix] and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought."

Maximum Price Regulation 292, as amended, Sections 1351.1405 and 1351.1414 (8 Fed. Reg. 135 and 543) provide in part:

"Definition and maximum prices of intermediate sellers: (a) For the purposes of this regulation, the term 'intermediate sellers' means any wholesale sellers, jobbers or any other persons who take title and purchase for the purpose of reselling and who customarily make sales to other wholesalers, retailers, or industrial, institutional or commercial users, except that the term 'intermediate sellers' shall not include packers, brokers, auction markets, terminal sellers or retailers as defined in this regulation. 'Intermediate sellers' shall include commission merchants who receive citrus fruits on consignment and sell in the same or similar manner as other wholesalers and such commission merchants shall come within the appropriate class of intermediate sellers set forth in this section according to the type of distributive service rendered."

* * * * *

"(b) Intermediate sellers shall be divided into the following classes:

"(2) *Class 2: Cash-and-carry wholesalers.* A cash-and-carry wholesaler is a wholesaler not in Class 1 who distributes citrus fruits for resale or to

commercial, industrial or institutional users and who does not customarily deliver to purchasers.”

* * * * *

“(g) Every intermediate seller selling citrus fruits shall:

“(1) Make and preserve for examination by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, remains in effect, records of the same kind as he has customarily kept relating to the prices which he charges for each item of citrus fruits after the effective date of this regulation and, in addition, records showing as precisely as possible, the basis upon which he determined maximum prices for each item.”

* * * * *

“§1351.1414” Definitions. (a) When used in this regulation, the term:

* * * * *

“(5) ‘Records’ includes books of account, sales lists, sales slips, orders, vouchers, contracts, receipts, invoices, bills of lading and other papers and documents.”

Statement of the Case.

On November 1, 1944, Charles H. Carr, United States Attorney for the Southern District of California, filed an information in four counts in the United States District Court for the Southern District of California, Central Division, charging appellant with violations of the Emergency Price Control Act of 1942 (50 U.S.C. App. 902 *et seq.*), as amended [R. 13-18], herein called the Act.¹

¹The symbol “R” refers to the printed record on appeal, the symbol “App. Br.” refers to appellant’s opening brief, and the symbol “Gov. Exh.” to the Government’s exhibits herein.

Counts 1 and 2 of the information each charge that appellant made a false entry in a document required to be kept under the provisions of the Act, respecting sales of oranges [R. 13-15]. Counts 3 and 4 each charge that appellant made a sale of oranges at a price in excess of the maximum permitted by the applicable maximum price regulations promulgated under the Act [R. 15-18].²

On November 9, 1944, appellant filed a demurrer and a notice of motion to quash and set aside this information [R. 19-21], which were overruled and denied, respectively, by the district court after hearing on November 27, 1944 [R. 25]. Appellant thereupon, on November 27 also, entered a plea of not guilty as to each count of the information [R. 25], and was tried before the district court and a jury on January 3 and 4, 1945 [R. 26-32].

On January 3, 1945, after the first witness had been sworn, appellant raised various objections to the sufficiency of the information [R. 56-60]. The district court thereupon granted the Government's motion to amend the information by the insertion of certain phraseology calculated to show that the Maximum Price Regulation 292,

²On October 13, 1944, appellant had filed a demurrer to an information originally filed against appellant on October 5, 1943 [R. 2-7, 9], as well as a notice of motion to quash and set aside the information [R. 10-11]. Following a hearing on the motion before the district court on October 23, 1943 [R. 22], a new information, referred to in the text, was filed by the Government with permission of the court [R. 12-18], upon which, as subsequently amended [R. 28], the prosecution of appellant was predicated [R. 28-29].

as amended, had been approved by the Secretary of Agriculture³ [R. 28-29].

After the Government had rested, the district court granted appellant's motion for a directed verdict as to counts 3 and 4 of the information, and denied the motion as to counts 1 and 2 [R. 30]. Thereafter appellant introduced evidence on his own behalf [R. 30-31], and later renewed his motion for a directed verdict [R. 94].

³The information as finally amended at the trial reads as follows, with the amendment shown in italics:

"COUNT ONE.

"That on or about the 27th day of October, 1943, in the City of Los Angeles, County of Los Angeles, State of California, in the district aforesaid and in the central division thereof, and within the jurisdiction of this Court, the defendant William Morris violated the provisions of the Emergency Price Control Act of 1942 as amended, in that he did knowingly, wilfully and unlawfully make an entry false in a material respect, in Morris Bros. Fruit Co.'s copy of a statement showing the sale to Aldrich & Company, 14 South Water Market, Chicago Illinois, of five hundred and eighty-two (582) boxes of oranges for the price of Four Dollars and Fifty Cents (\$4.50) per box, or a total sum of Two Thousand Six Hundred and Nineteen Dollars (\$2619.00), whereas the actual price charged for the sale of said oranges at said time and place was an average of Five Dollars and Fifty Cents (\$5.50) per box, or a total sum of Three Thousand Two Hundred and One Dollars (\$3201.00), which fact as to the price charged for said sale of said oranges was known to the defendant at the time of said entry, and said entry was false at the time of making said record, and said record was a document required to be kept under the provisions of Section 1351.1405(g) of Maximum Price Regulation 292, as amended (8 Fed. Reg. 135 and 8 Fed. Reg. 543), which was promulgated pursuant to the provisions of Section 202 of the Emergency Price Control Act of 1942, *which Regulation 292, as amended had been approved by the Secretary of Agriculture* [LRY J] as amended; in violation of Section 205(b) of the Emergency Price Control Act, as amended, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942) [R. 13-14].

Each of the other three counts were similarly amended [R. 14-18].

The jury found appellant guilty under both counts 1 and 2 of the information [R. 32-33, 105]. Thereafter, following its denial of appellant's motion for a new trial [R. 33-35, 105-107], the district court sentenced appellant to imprisonment for six months on count 1 and to pay a fine of \$2,500 on count 2 of the information [R. 37, 107].

Summary of Facts.⁴

On about October 15, 1943, one Arrigo, a partner in Aldrich & Company of Chicago, Illinois, which is engaged in supplying oranges and other items to hotels and other establishments, called at the Morris Brothers Fruit Company in Los Angeles, dealers in fruits [R. 64, 86], for the purpose of purchasing oranges [R. 69-70]. There Arrigo spoke to appellant [R. 70; see also R. 64], who is a partner in the latter concern, which is composed of appellant and his brothers Louis and Andrew Morris [R. 63, 64, 86, 87, 88].

Arrigo told appellant that he needed oranges "very badly," whereupon appellant offered to sell to Arrigo any quantity of oranges desired at \$4.50 a case [R. 70]. Upon Arrigo's reply that the quoted price was "cheap" and that he wanted some oranges, appellant stated: "Wait a minute. You have got to give me \$1.25 each case on the side" [R. 70]. Arrigo declined to pay the total price thus demanded by appellant and, "after an exchange of opin-

⁴Appellant's "Short Statement of Facts" (App. Br. pp. 2-6) consists of but some of the evidentiary matter in the record, and fails to present to this Court that evidence upon which alone the sufficiency of the evidence is to be tested on appeal—the evidence most favorable to the Government. Of course, it is elementary that only the evidence most favorable to the Government is to be considered herein by this Court, and appellant's obvious attempt to obtain from this Court consideration and evaluation of other evidence, must necessarily fail. See, *e. g.*, *Womble v. United States*, 146 F. (2d) 263 (CCA 9); *Hemphill v. United States*, 120 F. (2d) 115, 117 (CCA 9) cert. den. 314 U. S. 627.

ions," Arrigo departed without making a purchase [R. 70].

On October 27, 1943, Arrigo returned to the premises of the Morris Brothers Fruit Company where he again spoke to appellant [R. 70]. Arrigo stated in part that his firm needed oranges "at any price" [R. 70]. Appellant replied: "You are lucky anyway. By waiting a week You have saved 25¢. It is \$1.00 even extra today." [R. 70]. Thereupon Arrigo purchased two carloads of oranges from appellant [R. 71, 72, 74, 67, 89], receiving from appellant two "statements" [R. 71, 73, Gov. Exh.⁵ 2 and 3] reflecting this transaction [R. 72, 91-93]. These "statements," which had been prepared by an office employee under appellant's direction [R. 71, 87; see also R. 69], each showed that Morris Brothers Fruit Company on October 27, 1943, sold to Aldrich & Company, 582 boxes of oranges at \$4.50 a box or a total of \$2,619.00 for each of the two sales [Gov. Exh. 2-3]. Arrigo was given one of the duplicate copies of each of the "statements" thus prepared [R. 68, 69].

Arrigo, however, gave to appellant in payment of the purchase, six separate checks, totaling \$6,402.00 [R. 71, 72, 73-74, 75, 91-93].

Testifying in his own defense, appellant admitted at the trial that he sold the oranges mentioned above to Arrigo, testified that the price asked by him and received was \$4.50 a box, and denied that he received from Arrigo the full sum which Arrigo claimed to have paid him in the transaction [R. 86-87]. Appellant further testified that the two statements concerning the transaction were prepared by "the girl," that she computed the price, and that

⁵The original exhibits are by stipulation of counsel and order of Judge Wilbur before this Court [R. 113-115].

he did not tell her “anything about what to put on the statements” [R. 87]. Appellant in part admitted on cross-examination, however, that during the period when he made these sales to Arrigo, he, appellant, “had complete charge of the place,” the Morris Brothers Fruit Company, that he “had charge over the bookkeepers and clerks and gave them directions which they carried out,” and that in some instances he “checked up on them to see that they were following my directions” [R. 88].

In addition, appellant’s brother Andrew in part testified in defense that two of the checks totaling \$1,164, which Arrigo had testified were in part payment of the oranges, were cashed for Arrigo by Andrew at the former’s request [R. 88-90] out of personal funds, as to which Andrew further testified: “I had the money in my pocket” [R. 90].

In rebuttal, Arrigo denied Andrew’s testimony [R. 73-74, 91], and testified that the sum of \$1,164 represented twice 582 [R. 91, 92], the total number of boxes of oranges which Arrigo purchased from appellant. at \$1 overcharge per box [R. 98].

Questions Presented.

1. Whether the information upon which appellant was tried states an offense.
2. Whether the district court erred in denying appellant’s motion for a directed verdict as to counts 3 and 4, and whether the evidence is sufficient to support the verdict of guilty as to those counts.
3. Whether the court committed reversible error in its various rulings during the case.
4. Whether the court committed reversible error in giving certain instructions and refusing to give others to the jury.

Summary of Argument.

I.

The information as amended states an offense.

II.

The evidence was sufficient to warrant the district court's denial of appellant's motions for a directed verdict as to counts 1 and 2, and to support the verdict of guilty under each of these counts.

III.

No reversible error was committed by the district court in its various rulings in the case.

IV.

No reversible error was committed by the district court in giving certain instructions to the jury and refusing to give others requested by appellant.

I.

The Information as Amended States an Offense.

A.

Appellant asserts that the trial court permitted the amendment of the information at the outset of the trial "without the consent of the defendant" (App. Br. p. 18), without "formal opportunity to plead or to object thereto" (App. Br. p. 20), and without the consent of the person over whose verification as to the truth of the matters alleged therein the information was issued (App. Br. pp. 19-20). Appellant further asserts that the information could not be amended "without the consent of the person who verified the oath" (App. Br. p. 19) and that the information as amended is fatally defective under the rule of *Ex Parte Bain*, 121 U. S. 1. There is no merit to these contentions.

First, appellant misconceives the holding of *Ex Parte Bain*. That case deals with amendments to an indictment; it has nothing to do with amending an information. It

is established, of course, that an indictment cannot be amended (*Ex Parte Bain*). But it is likewise established that an information can be amended. (See, *e. g. Armstrong v. United States*, 16 F. (2d) 62 (CCA 9), cert. den. 273 U. S. 766; *Walker v. United States*, 7 Fed. (2d) 309 (CCA 9); *Muncy v. United States*, 289 Fed. 780 (CCA 4).)

And it is further settled law that an information need not be verified. (See, *e. g. Cyclopedia of Federal Procedure*, 2nd Ed. Vol. 9, Sec. 4107; *Walker v. United States*, 7 F. (2d) 309 (CCA 9-1925); *Abbot Bros. Co. v. United States*, 242 Fed. 751 (CCA 73; *Weeks v. United States*, 216 Fed. 292 (CCA 2); *Christian v. United States*, 8 F. (2d) 732 (CCA 5-1925)⁶; *Tynan v. United*

⁶Thus, in the *Christian* case, *supra*, the Court in part stated:

"The only purpose served by an oath to an information is to furnish a basis and authority for the arrest of the defendants. Logically, the only advantage a defendant could take of an unverified information would be to secure his release from custody, because there was no proper warrant of arrest. Whether the defendant is properly in custody is a matter which does not affect the information. It was all-sufficient that defendant was present and submitted to trial on a valid information."

And, in the *Weeks* case, *supra*, the Court said:

"* * * the right secured to the individual by the fourth amendment, as we understand it, is not a right to have the information, by which he is accused of crime, verified by the oath of the prosecuting officer of the government or to have it supported by the affidavit of some third person. His right is to be protected against the issuance of a warrant for his arrest, except 'upon probable cause supported by oath or affirmation,' and naming the person against whom it is to issue. If the application for the warrant is made to the court upon the strength of the information, then the information should be verified or supported by an affidavit showing probable cause to believe that the party against whom it is issued has committed the crime with which he is charged. But, if no warrant has issued, no arrest been made, and the person has voluntarily appeared, pleaded to the information, been tried, convicted, and fined, we fail to discover wherein any right secured to him by the fourth amendment has been infringed."

See also: *Walker v. United States*, 7 F. (2d) 309 (CCA 9, 1925) and *Pittman v. United States*, 42 F. (2d) 793 (CCA 8, 1930).

States, 297 Fed. 177 (CCA 9), cert. den. 266 U. S. 604.)

Secondly, the record fails to support appellant's assertions that the amendments were allowed without his consent, without opportunity to object, and without the consent of the person who verified the oath (App. Br. pp. 18, 19, 20). There is nothing in the record to show that appellant did not consent to the amendments or that he had no opportunity to object to them [see R. 58-60]. In fact, the record clearly reveals that there was ample opportunity for appellant to object, but that he did not avail himself of that opportunity [see R. 58-60], and that, moreover, appellant expressly stipulated in effect that the proceedings had prior to the amendment were to be considered as had on the information as the amended [R. 59-60]. Had appellant not consented to the amendments, he plainly would not have entered into such a stipulation. At least appellant would have recorded this objection to the amendment, which he did not do. Appellant's present contentions, therefore, merit only summary rejection.

Likewise without record support is appellant's assertion (*supra*) that the information's verifier did not consent to the amendment. There is nothing to show that he did not consent. And since he was the O. P. A. investigator familiar with the facts of the case, it is specious to argue, as appellant does, that he did not consent to the addition of language indicating that the Secretary of Agriculture duly approved the regulation involved—a fact established by the Federal Register. Counsel for the Government having moved the amendment of the information, it is to be presumed, unless the contrary is shown—and it has not been shown in this case—that counsel acted with the consent of the persons he represented and that his actions were in all respects regular and in conformance with law.

Moreover, since the information was filed by the United States Attorney, Government counsel, as an Assistant United States Attorney, was acting as the former's direct representative with authority to amend the information.

B.

Appellant asserts (App. Br. p. 21) that it was essential that the Secretary of Agriculture approve the price regulation here involved prior to the commencement of this case. The original information herein was filed on October 5, 1944 [R. 7, 8]. The Secretary of Agriculture duly approved the regulation on or prior to December 31, 1942 (8 Fed. Reg. 135-138). Therefore appellant's assertion is palpably pointless.

C.

Appellant next asserts in effect (App. Br. 21-24) that the information "fails to set up" that the Secretary of Agriculture approved the regulation herein involved and that the information does not contain other allegations which appellant conceives to be essential. The short answer is that, contrary to appellant's assertion, the information as amended at the trial specifically states that "regulation 292 as amended had been approved by the Secretary of Agriculture" [R. 14, 15, 28]. And amendment of the information in this respect was within the trial court's discretion, and in this instance clearly proper and unobjected to by appellant either at the time of amendment [R. 58-60] or at present on this ground. Moreover, it was not necessary even to amend the information since it properly states an offense without the added matter.

D.

The balance of appellant's assertions (App. Br. pp. 21-22) as to matters which he conceives should be included in the information, are presented so feebly as to warrant no reply beyond the statement that such matters need not be pleaded.⁷

II.

The Evidence Was Sufficient to Warrant the District Court's Denial of Appellant's Motions for a Directed Verdict as to Counts 1 and 2, and to Support the Verdict of Guilty Under Each of These Counts.

Appellant asserts (App. Br. pp. 36 ff.) that the evidence is insufficient to support the verdict of guilty, and reargues in this connection most of the contentions already made by him elsewhere in his brief. There is no merit to appellant's contentions.

In discussing the sufficiency of the evidence, appellant in effect seeks a reappraisal and reweighing of the testimony before the jury. It need hardly be stated that appellant is not entitled to a reappraisal and reweighing of all the evidence in the record. And the evidence most favorable to the Government, which we have summarized above, fully and credibly demonstrates that appellant made or caused to be made false entries in records customarily kept in the regular course and conduct of his business. That was a violation of the applicable law.

⁷Moreover, it should be noted that the validity of a regulation of the type here involved can be challenged only before the Emergency Court of Appeals. *Yakus v. United States*, 320 U. S. 730.

In view of the clear and ample evidence which we have detailed above, further discussion of it appears to be unnecessary.

Likewise, it would serve no useful purpose to reconsider here the various contentions made by appellant under the general heading of insufficiency of evidence but which he has already raised elsewhere in his brief, and which we have also answered elsewhere in this brief.⁸

III.

No Reversible Error Was Committed by the District Court in its Various Rulings in the Case.

A.

Appellant complains (App. Br. pp. 27-35) that the District Court erred in admitting in evidence the testimony of witness Ann Joseph respecting the bookkeeping practices of Morris Brothers Fruit Company. This complaint is plainly lacking in substance.

Witness Joseph was the head bookkeeper of Morris Brothers Fruit Company between June, 1943 and July, 1944 [R. 67]. She testified in effect that "statements" of the type which Arrigo had received from appellant [Gov. Exh. 2-3] are made out in duplicate whenever car-load lots of oranges are shipped; that, in addition, bills of lading for such shipments are made out in triplicate; that the original bill of lading is sent to the railroad; that a copy of the bill of lading, with a copy of the "statement" is sent to the purchaser; and that "we kept" the third copy of the bill of lading "with a duplicate state-

⁸There is no reason to raise before this Court, as appellant does (App. Br. pp. 25-27), any issue as to the receipt in evidence of Government Exhibit 1, since this exhibit pertains solely to counts 3 and 4, which the trial court dismissed upon appellant's motion [R. 84-85].

ment attached so that when it was paid we would mark that copy and put it back in the files so that we kept a permanent record of all these things" [R. 68].⁹

The testimony of the head bookkeeper as to the record-keeping practices of Morris Brothers Fruit Company, is clearly competent to show what was done in the usual course of business in this respect prior to the promulgation of the maximum price regulation involved in this case, as well as thereafter. Morris Brothers Fruit Company was required by the Act and its regulations to make truthful entries upon whatever books and records were customarily kept by that concern. No citation of authority is required for the proposition that what those records were, manifestly could be established by the testimony of the head bookkeeper in charge of such work and records, which is precisely the substance of Joseph's testimony.

But Joseph was not alone in testifying that the statements were prepared customarily in duplicate; for appellant's brother and partner, Louis Morris, who is "the manager in charge" of Morris Brothers Fruit Company [R. 87], also testified, referring to Government's Exhibit 2, one of the statements, that it is "one of the regular statement forms of Morris Brothers Fruit Company. It was the custom of the company to make these up in duplicate" [R. 65, 66].

⁹It should be noted in this connection that appellant's restatement of this witness' testimony (App. Br. pp. 28-35) is inaccurate and misleading in the instances in which appellant seeks to persuade this Court that Joseph testified that one of the duplicate copies of the *statement* was sent to the railroad and the other to the purchaser, leaving none for the records of Morris Brothers Fruit Company (App. Br. pp. 28, 29, 36). That is not true, as is clearly shown by the record. Joseph testified that the original of the *bill of lading* was sent to the railroad, that copy with a "statement" attached went to the customer and that "we kept the other *with a duplicate statement attached* * * * [R. 68].

Moreover, there is no word of testimony in the record that it was *not* the custom of Morris Brothers Fruit Company to make and keep such records in the regular course and conduct of its business. It would have been a simple matter, in view of Joseph's affirmative testimony in this respect, for the appellant to have produced at least one of the "bookkeepers and clerks" [R. 88] to testify that no such records were kept, if that were the fact. No such testimony was offered; and neither appellant nor his brother-partner, appellant's sole defense witness, denied that such records were kept either customarily or in the specific instances involved in this case [R. 86-90].

And it should not be overlooked that appellant himself deliberately obstructed the Government's effort to establish the record-keeping practices of Morris Brothers Fruit Company and the presence in its files of the two statements, by removing the records from the custody of his copartners and employees [R. 63, 64, 65], and thereby making it impossible to have the records produced at the trial. Thus, prior to the trial herein, a subpoena *duces tecum* was issued requiring the production of the originals from the files of Morris Brothers Fruit Company. At the trial, Louis Morris, one of appellant's brothers and partners [R. 63], who is also the manager in charge of that concern [87], upon whom the subpoena had been served, testified that he was unable to produce the original records because appellant "has got them" [R. 63, 64, 65]. The records were not produced. These records are "quasi-public" records, whose availability for inspection and use by proper governmental authorities in legal and other proceedings, is fully established, and requires no citation of authorities. In view of appellant's deliberate concealment of legally usable records which would have

fully disclosed the very facts which he now disputes, he can hardly be heard to protest now against the use of secondary evidence in that respect. And, regardless of appellant's participation in the record-removal episodes, absent the original records for any cause, secondary evidence of the type present in this record was clearly admissible and entitled to weight.

Little need be said concerning the cases quoted and cited by appellant (App. Br. pp. 29-35, 41-45), except that they are beside the point. Obviously, the rules governing admissibility of "general custom and usage" and "habit" evidence in negligence (App. Br. pp. 29-30), land deeding (App. Br. p. 30), stock ownership (App. Br. pp. 30-31), gambling and intoxication (App. Br. pp. 31-33), and passenger receiving (App. Br. p. 33) cases, have nothing to do with the issues of the instant case. Here under the regulations (*supra*), appellant, as well as Morris Brothers Fruit Company, was required to abstain from making "any statement or entry false in any material respect" (*supra*), in its customarily kept records. Louis Morris testified that Government Exhibit 2 was "one of the regular statement forms of Morris Brothers Fruit Company," and that it has always been the custom of the company to make these up in duplicate [R. 65, 66]. The head bookkeeper of this concern also testified that it was the custom of that concern to make these "statements" in duplicate "for the shipment of cars,"¹⁰ and that the exhibits in question "represent shipment of cars" [R. 68]; that one of the duplicates is fur-

¹⁰Appellant and his partners "sell oranges in carload lots and truckload lots" [R. 89], for a gross income of about \$1,000,000 a year [R. 86].

nished to the customer and the other is retained in the files of Morris Brothers Fruit Company “so that when it was paid we would mark the copy paid and put it back in the file so that we keep a permanent record * * *” [R. 68]. And there is no evidence that the “statements” in issue were not so customarily kept. Clearly the evidence in this case respecting the records does not fall within the holdings of cases relied on by appellant.

B.

Appellant complains (App. Br. pp. 35-37) as to the receipt in evidence of Government’s Exhibits 2 and 3 on the ground that these exhibits came from Arrigo and not the records of Morris Brothers Fruit Company and further, that they fail to show that appellant falsified a document kept in that concern.

These exhibits are carbon copies—duplicate originals—of the statements prepared under the direction of appellant and show the price demanded by appellant and paid by Arrigo (*supra*). Arrigo testified that the price he paid was in excess of that shown by appellant on these statements (*supra*). Consequently these statements in evidence conclusively establish the making by appellant of a false entry in this transaction, and were clearly admissible for this purpose.

Upon these facts, the exhibits were clearly admissible in evidence for the purpose of establishing the making by appellant of false entries. And in addition, these statements were admissible for the further purpose of establishing that the other duplicate original copies were retained in the files of Morris Brothers Fruit Company as part of their regular records, not only because of their being duplicate original copies, but also from the testimony of Morris and Joseph, which we have already discussed.

IV.

No Reversible Error Was Committed by the District Court in Giving Certain Instructions to the Jury and Refusing to Give Others Requested by Appellant.

A.

Appellant now seeks (App. Br. pp. 17-18) for the first time in this case, to raise before this Court the contention that the trial court did not properly charge the jury, and seeks to justify its raising of this point for the first time on appeal by asserting that it is the trial court's duty to give proper instructions (App. Br. pp. 17-18). Appellant's contentions in this respect are wholly meritless, since appellant had a duty to note proper exceptions and was reminded of this by the trial judge.

There is no justification for appellant's attempt to circumvent the explicit rules of Court pertaining to the preservation of a proper record for appeal. Appellant, having failed to take exception to the trial court's charge to the jury along the lines he now urges, and having failed to assign error or make any specification of error in the matter, should not now be permitted to obtain from this Court consideration of his after-thought complaint. True, a trial court should give the proper instructions to the jury. Likewise, a trial court should rule correctly upon every motion and objection before it. But to permit appellant to bring into the case at this time a matter of this type for the advanced reason that the trial court should have done the right thing in the first place, would be tantamount to eliminating all the rules of court pertaining

to exceptions, assignments of error, specifications of error, and the preservation of a proper record on appeal. The chaotic result upon this Court's rules and procedure by the acceptance of appellant's contentions in this respect hardly requires exposition.

Had appellant made timely objection in the lower court, the matter might have been corrected, if necessary, before the jury began consideration of the issues. Such objection appellant failed to raise in time, to permit possible correction by the trial court. Plainly appellant, having slept on his rights, should not be permitted at the present time to nullify the eminently just verdict of the jury.

B.

Appellant's contention (App. Br. p. 18) that “* * * neither the Court, counsel, nor jury, could know from the instructions given upon what charge the defendant was being tried,” is palpably baseless. Of course, the information [R. 13-18] was before the jury at all times. In addition, the trial court instructed the jury that the offense charged was a violation of the Act [R. 96], and that only counts 1 and 2 were before the jury [R. 98]. The trial court then charged:

“If you believe beyond a reasonable doubt that on or about October 27, 1943, defendant sold five hundred and eighty-two boxes of oranges to Aldrich & Company at a price of \$5.50 per box, or for a total sum of \$3,619.00, and that said transaction was on behalf of Morris Brothers Fruit Company, and that defendant wilfully and deliberately, and not as a result of innocent mistake entered upon said Morris Brothers Fruit Company's copy of a statement show-

ing such sale, an entry that the sale had been made at a price of \$4.50 per box or a total sale price of \$2,619.00, and that the statement was made in a record of the kind customarily kept by Morris Brothers Fruit Company, during the time prior to January 11, 1943 (effective date of Regulation) then you will find defendant guilty as charged in Count One of the Information, regardless of what you may believe the correct ceiling price of such oranges to have been at said time.

“On the other hand, if you entertain a reasonable doubt as to whether any one or more of the elements I have just recited to you have been proved, you must give the defendant the benefit thereof and acquit him” [R. 98-99].

* * * * *

“The court instructs you that the regulation under which this case arose, Maximum Price Regulation 292, was promulgated by the Price Administrator on December 31, 1942, to become effective January 11, 1943, and was duly approved by the Secretary of Agriculture before its promulgation, and that all this was done pursuant to the authority granted by the Congress of the United States in the Emergency Price Control Act of 1942, as amended.”

“The regulation was duly published in Volume 8 of Federal Register, pages 135-138, under date of January 5, 1943” [R. 99].

It is clear that while the trial court did not read to the jury the regulation which appellant was charged with having violated, the formula instructions quoted above which

the trial court gave were plainly sufficient and fully apprised the jury of the necessary elements which had to be present to constitute the violations alleged in the information. These instructions translated the language of the regulation into simple, understandable tests by which the jurors were to determine the questions of fact and apply the law and thereby provided the jury with all of the material which a reading of the regulation could have supplied. And *Corson v. United States*, 147 F. (2d) 542 (CCA 9, 1945), cited by appellant does not support his position, because the trial court in this case carefully and fully did precisely what the decision in the *Corson* case held should be done. Manifestly, no reversible error was committed here.

C.

Appellant argues (App. Br. pp. 45-49) that the trial court erred in refusing to give to the jury appellant's proposed instructions 3-6 inclusive. There is no merit to this argument.

These proposed instructions (App. Br. pp. 45-47) all pertained to the definition of an accomplice and to the proposition that Arrigo was an accomplice of appellant, and that, therefore, the jury should view his testimony with caution and distrust. Specifically also appellant wanted the jury charged that one who buys at a price above the ceiling price is an accomplice of the seller and equally guilty (App. Br. p. 46).

Appellant was not entitled to any "accomplice" instructions since counts three and four, under which Arrigo

might be said to be an accomplice had been dismissed at the close of the Government's case [R. 84-85] and counts one and two relate to false entries, as to which Arrigo plainly had no part. As stated by the trial court [R. 103]:

“ . . . with the elimination of the two counts, there is no accomplice question before the court because the regulation charges him with keeping books, and an accomplice must be guilty of the same offense, and the regulation does not require the buyer to keep any books.

“Therefore, with counts three and four, the question became moot and I can't very well give an instruction on accomplices because on counts one and two, Mr. Arrigo was not an accomplice.”

The trial court was manifestly correct.

As stated by this court in *Caminetti v. United States*, 229 F. 545 (affirmed, 242 U. S. 470):

“The test by which to determine whether one is an accomplice is to ascertain whether he could be indicted for the offense of which the accused is being tried. 12 Cyc. 445.”

Plainly in this case Arrigo was not subject to indictment for the offense for which appellant was convicted under counts 1 and 2.

Moreover, it has long been recognized that the making or withholding of a cautionary instruction with respect to the testimony of an accomplice, is a discretionary matter. Thus in *United States v. Becker*, 62 F. (2d) 1007 (C.C. A. 2d 1933), the court, discussing this subject, stated:

“The warning is never an absolute necessity. It is usually desirable to give it; in close cases it may turn the scale; but it is at most merely a part of the general conduct of the trial, over which the judge’s powers are discretionary, like his control over cross-examination, or his comments on the evidence. If he thinks it unnecessary—at least when, as here, the guilt is plain—he may properly refuse to give it.”

In *Wallace v. United States*, 243 F. 300 (C.C.A. 7th 1917), the court said:

“But, if it were conceded that all of them were accomplices, there is no absolute duty on the court to give to the jury the usual charge cautioning them to exercise circumspection with respect to the evidence of accomplices, so that failure to give it would of itself be reversible error.”¹¹

¹¹Also, in *United States v. Block*, 88 F. (2d) 618 (C. C. A. 2d, 1937), the court stated:

“The only other question raised on Block’s appeal is the failure of the judge to tell the jury that they should look jealously at the testimony of Rubin, as an accomplice. It is common practice so to caution a jury, but it is not necessary even when as here the accused asks that it be done.”

And, finally, in *Greenberg v. United States*, 297 F. 45 (C. C. A. 8th, 1924), it was held that:

“While it is the better practice in a criminal prosecution to give an instruction cautioning the jury against too much reliance on the testimony of an accomplice, the failure to give such an instruction is not reversible error, and there is no absolute rule of law preventing conviction on such testimony.”

See, to like effect, *Bosselman v. United States*, 239 F. 82 (C. C. A. 2d, 1917), and *Hanks v. United States*, 97 F. (2d) 309 (C. C. A. 4th, 1938). And it is noteworthy in this respect that testimony of Arrigo was corroborated by documentary evidence, particularly Government Exhibits 2-9, inclusive.

Conclusion.

The evidence upon which the jury found appellant guilty plainly furnishes adequate support for that verdict. The trial court committed no reversible error in its rulings, or in its instructions or refusals to give instructions to the jury. Appellant has had a fair and full trial. There is no reason for setting aside the verdict and the lower court's judgment. The judgment should be affirmed.

Respectfully submitted,

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No. 10967

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM MORRIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

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FILED

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No. 10967
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

WILLIAM MORRIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

Comes now the United States of America, appellee in the above entitled cause, and presents this, its Petition for Rehearing of the above entitled cause, and in support thereof respectfully shows:

Statement of Grounds for Rehearing.

That the opinion of this Honorable Court, reversing the judgment of conviction in the above entitled case,

(1) Misconstrues the Instructions given the jury by the trial court;

(2) Disregards the fact that the Court instructed the jury upon all elements of the crime charged;

(3) Misconstrues the holding of cases cited as authority for reversal;

(4) Disregards entirely the rule that error must be prejudicial before a conviction will be reversed;

(5) Ignores the fact that the point upon which the Court reversed the conviction was never raised in the trial court, and that although the trial judge particularly invited counsel to indicate any dissatisfaction, Appellant did not direct the attention of the trial judge to the purported source of error;

(6) Ignores the fact that although an exception was taken to certain Instructions, no exception was taken to the particular Instruction upon which the Court bases its reversal;

(7) Ignores the fact that further Instructions defining the crime alleged were not requested by Appellant;

(8) Reverses the conviction of a man, plainly guilty, because of the form of an Instruction although the substance of the Instruction was complete and correct.

Questions of Law.

(1) Did the District Judge commit error in the Instruction wherein he charged the jury on the elements of the crime charged?

(2) If the District Judge did commit error in giving said Instruction, was the error reversible, in the absence of the taking of an Exception at the trial; and under the circumstance that Appellant did not request either amplification of the Instruction or that it be cast in another form or that some additional instruction be given?

The questions will be considered under the following headings:

(1) The District Court Adequately and in Proper Form Instructed the Jury as to the Elements of the Offense Charged.

(2) If There Is Formal Error in the Record, It Is Not Reversible Error.

ARGUMENT.

The District Court Adequately and in Proper Form Instructed the Jury as to the Elements of the Offense Charged.

(A) THE INSTRUCTION IN QUESTION IS IN HARMONY WITH THE AUTHORITIES CITED IN THE MAJORITY OPINION.

The footnote on page 6 of the Opinion refers to several cases, none of which condemn the type of Instruction given and some of which infer it to be a proper style of Instruction as a vehicle for defining the crime charged.

Bird v. United States, 180 U. S. 356, is cited in the Opinion as support for this statement.

“An instruction which does not state any proposition of law, or only states the result of the law’s application, is erroneous.”

This language does not appear in the case. The Court in its Opinion did not condemn the so-called formula type of Instruction. The only definition of the crime charged in the *Bird* case was given in such an instruction.¹ Reversal occurred, not because the law was stated to the jury only in a hypothetical proposition, but because a proper element of the law was omitted.

The questioned Instruction reads thus :

“The court instructs the jury, if they believe from the evidence beyond a reasonable doubt that the de-

¹*Bird v. United States*, 180 U. S. 356 at p. 362: “As the trial judge allowed and signed a bill of exceptions to his instruction in this behalf, it cannot be fairly presumed that the error was healed by any modification or correction in some other and undisclosed part of his charge.”

fendant Homer Bird, on the 27th day of September, 1898, at a point on the Yukon River, about two miles below the coal mine known as Camp Dewey and about 85 miles above Anvik and within the District of Alaska, shot and killed one J. H. Hurlin, and that said killing was malicious, premeditated and willful, and that said killing was not in the necessary defense of the defendant's life or to prevent the infliction upon him of great bodily harm, then it is your duty to find the defendant guilty as charged in the indictment.' ”

“The bill of exceptions shows that to ‘this instruction the defendant then and there excepted for the reason that the same is erroneous because not qualified by the further charge that if the defendant believed, and had reason to believe, that the killing was necessary for the defence of his life or to prevent the infliction upon him of great bodily harm, then he was not guilty.’ ”

The Supreme Court had the challenged Instruction before it as the only Instruction on the subject. The Bill of Exceptions contained no other Instruction. The Court declined to presume that “the error was healed by any modification or correction made in some other undisclosed part of his charge.”

The crime charged was murder. The statutes defining murder and its included lesser offenses are brief (as compared to about two printed pages in this case).

Had the Court felt statutory language or a condensation thereof the necessary style of the charge the Opinion would have so stated, for the case was remanded for a new trial. When and if the new trial was had the District Court was without any hint from the reversing Court

that it should read or summarize the statute. Instead it was told by the Supreme Court that the formula Instruction given the jury was incomplete because it did not contain the following language, which was designed to enlarge, not statutory language, but the language of the formula Instruction:

“* * * if the defendant believed, and had reason to believe, that the killing was necessary for the defense of his life or to prevent the infliction upon him of great bodily harm, then he was not guilty.”

The comment of the Supreme Court on this omission reads as follows:

“It is well settled that the defendant has a right to a full statement of the law from the court, and that a neglect to give such full statement, when the jury consequently fall into error, is sufficient reason for reversal.”

It is apparent, on a full study of the case, that the Supreme Court directed its criticism to a matter of content and not of form or style; and it appears from the following language that the Court understood the formula to be an Instruction of law, and an explanation of law, not an invasion of the function of the jury.

“The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved.”

Had the omitted matter been included the “chief object” of an instruction would have been fulfilled and would have

made the charge good for it would have served to “point out the essentials to be proved on the one side and the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved.”

We have treated this decision at length because:

1. The case is one of two Supreme Court cases cited in the majority opinion;

2. It is axiomatic that when an Appellate Court indicates that a particular Instruction should be given, and remands for a new trial because it was not given, that the Trial Court will give it in the form indicated on the new trial. We assume that the Supreme Court in thus directing the amendment, would have directed the reading or mere summarization of the statute prohibiting murder, had it felt such an Instruction necessary, for no such Instruction had been given before. Instead, the higher Court ruled that the offered amendment should have been added to the Instruction, thereby clearly indicating that such an Instruction, if it includes all the elements, is an Instruction defining the law applicable and that the Instruction was capable of amendment in its formula style, rather than a form to be discarded in favor of a reading of a bare definition cast in statutory or textbook language.

In *Screws v. United States*, 325 U. S. 91, also cited in the majority opinion, the Opinion omits the text of the Instruction. It does point out that the Court should have charged that the acts allegedly done were done “wilfully” whereas the Instruction used the word “illegally.”

In the case before this Court it has never been suggested either in counsel’s brief or in the majority opinion, that any element of the crime was omitted from the Instruc-

tion; or that a false element has been added to it. The complaint appears to be that

“The jury was never given an explanation or definition or enacted text of the offense charged, but instead were told that if they found certain enumerated facts, the verdict must be one of guilty; otherwise the verdict must be one of not guilty.”

The *Screws* case lends no aid to either the theory of the majority of the Court or the theory adopted by the Trial Judge. It is not in point for it deals only with the giving of an Instruction which gave the jury a false standard. The majority opinion in the present case in effect says that the Trial Court did not give the jury any definition of the crime, citing for that the ruling the *Screws* case and the *Bird* case, although the *Bird* case holds that the giving of a complete formula is a satisfactory statement of the law defining the crime. The *Bird* case in criticizing the substance of Instructions not only did not criticize the “formula” method of explaining the law, but sent the case back for a new trial with errors of substance in the formula corrected.

Corson v. United States, 147 F. (2d) 437, also cited, does not assist in this problem. There was no formula Instruction there. The question concerned inadequacy of an Instruction because of omission of a matter of substance rather than a question of form. In *Christensen v. United States*, 90 F. (2d) 152, the Opinion does not reveal the style of the Instruction, but reverses because of a substantive lack. *Kreiner v. United States*, 11 F. (2d) 722, deals with character Instructions and does not touch the point involved in this appeal. *United States v. Harris*, 45 F. (2d) 690, holds that “the court should be astute to see that the charge advised the jury of all the essential

elements of the crime." The element "knowingly" was omitted. *Allen v. Roydhouse*, 232 Fed. 1010, is a civil case and deals with segregation of matters of fact from matters of law.

The only comment *re* Instructions in *Massee v. Williams*, 207 Fed. 222, appears to be "It was the court's duty to charge the law arising upon the facts as applicable to such facts so as to aid the jury in arriving at a correct conclusion."

Sections 1189-1190, Corpus Juris Secundum, cited in the majority opinion, contain a great deal of text as to what instructions must contain. They do not contain any statement that the style in which the jury is instructed must be such as to include the reading of the statute or a textbook-like digest thereof.

People v. Fox, 185 Pac. 211, is cited in the note to Section 1189 and as authority for that portion of the section which reads:

"as a general rule, it is the duty of the trial court to instruct the jury distinctly and precisely on the law of the case."

In *People v. Fox* the defendant was convicted of embezzlement. In affirming the judgment it was said:

"It was the duty of the court 'in charging the jury' to state to them all matters of law necessary for their information. Section 1127, Penal Code. The instruction complained of was a correct statement of the law and clearly applicable to the theory of the prosecution. * * *"

The Instruction referred to defined the crime by giving the jury a formula as follows:

"If you find from the evidence beyond a reasonable doubt that the defendant did, on or about the date

charged in the information, fraudulently appropriate the moneys of Mrs. Anna G. Walters after said moneys had been intrusted to him and that said moneys were appropriated to a use or purpose other than that for which such property was intrusted to him, you should find the defendant guilty of embezzlement as charged in the information.”

Note that the jury in the *Fox* case was told that if they found certain enumerated facts, the verdict must be one of guilty.

This is the claimed fault with the Instruction in this case. The majority opinion states, “a jury’s duty cannot be so limited by a judge.” However, in the *Fox* case the District Court of Appeal stated, “The instruction complained of was a correct statement of the law. * * *”

“Every charge to the jury, which is a real charge, and not merely a colorless statement of the law and of the issues of fact involved, ought to reflect the real issue arising out of the evidence, and also as presented in the arguments addressed to the jury. It can never be rightly interpreted unless it is read in the atmosphere of the trial. If the parties, in presenting their cause, strip it of all formalities and technical distinctions, and get right down to the marrow of the case, and to a discussion of the substantial questions involved, it is not only helpful to the jury, but inevitable, that the charge should reflect the same spirit. There can never be applied to a charge under such circumstances the canons of criticism to which a treatise on the law of the case could properly be subjected. * * *”

United States v. Stilson, 254 Fed. 120, at 125.

People v. Leddy, 95 Cal. App. 659, 273 Pac. 110, considers and approves a similarly styled Instruction.

(B) THE JURY WOULD NOT HAVE BEEN BETTER INFORMED HAD THE COURT READ THE STATUTE AND REGULATION.

The trial Judge fully advised the jury that it was the sole judge of the facts [R. 94-95] and that his Instructions were the law [R. 94-95-96].

Had he elected to read the statute and regulation under which the information was drawn, his Instructions would have become lengthy beyond the ability of a juror to readily remember.

Recourse would have become necessary in the jury room to the written Instructions. Questions of statutory interpretation would easily have arisen in the discussions of the jurors.

Such Instructions are not favored. The Supreme Court of California in *People v. Albertson*, 23 Cal. (2d) 550, 145 P. (2d) 7 (1944), declared:

“An instruction in the language of a statute is proper only if the jury would have no difficulty in understanding the statute without guidance from the court * * * (citations). It is not proper if reasonable men might differ as to the construction of the statute, for it would delegate to the jury the function of statutory interpretation that belongs to the Court.”

The statute and regulations applicable, in their pertinent portions, provide:

Sections 202 and 205(b) of the Emergency Price Control Act of 1942, as amended, 56 Stat. 23 (50 U. S. C. App. 901 *et seq.*), provide in part:

Section 202 (50 U. S. C. App. 922) :

“Investigations, records; reports

* * * * *

“(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmation and may, whenever necessary, by subpoena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.”

(202b)

Section 205(b) (50 U. S. C. App. 925) :

“Enforcement

* * * * *

“(b) Any person who willfully violates any provision of section 4 of this Act (section 904 of this appendix), and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202 (section 902 or 922 of this Appendix), shall, upon conviction thereof, be subject to a fine of not more than \$5,000, or to imprisonment for not

more than two years in the case of a violation of section 4(c) (section 904(c) of this Appendix) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

Maximum Price Regulation 292, as amended, Sections 1351, 1414 (8 Fed. Reg. 135 and 543 (G)).

“(g) Every intermediate seller selling citrus fruits shall:

“(1) Make and preserve for examination by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, remains in effect, records of the same kind as he has customarily kept relating to the prices which he charges for each item of citrus fruits after the effective date of this regulation and, in addition, records showing as precisely as possible, the basis upon which he determined maximum prices for each item.”

* * * * *

“§1351.1414” Definition. (a) When used in this regulation, the term:

* * * * *

“(5) ‘Records’ includes books of account, sales lists, sales slips, orders, vouchers, contracts, receipts, invoices, bills of lading and other papers and documents.”

It is the first duty of the Court in charging the jury to see that all elements of the offense are brought before

the jury in understandable form. As is apparent from a study of the cited cases, the great peril is that some element will be incorrectly stated, or left out, or written into the Instruction although it does not exist in the statute. Similar peril is present in undertaking to summarize statutes and long regulations such as are involved in this case. To reduce the case to an understandable formula is simpler than to condense statutory language. It results in a rule which jurors can readily comprehend. If done without comment within the formula, it is impossible for a juror to know the Judge's view of the evidence.

Modern Courts, in the cited cases, have held the giving of the formula to be an Instruction of law.

Each element, necessary to support guilt, was carefully stated in the formula. Had the jury digested the statute and regulation, it would have found that several questions would have to be answered in its inquiry as to whether an offense had been committed. It has not been suggested in Appellant's brief, or in the majority opinion, that such questions would properly be any different than the ones set forth in the Court's Instruction. It is certainly more conducive to proper verdicts to have the Court determine the essential elements of a crime and state them simply, than for jurors to embark on analysis of statutes which are of even moderate complexity.

We have not found any case which holds that such an Instruction is not an Instruction of law. The cases herein discussed hold that it is such an Instruction. This method of Instruction is not novel. It appears to have survived from early in our jurisprudence without inciting the development of any case law against it.

If There Is Formal Error in the Record It Is Not Reversible Error.

Had the Court instructed the jury by reading of the statute and regulations it would not have provided the jury with any additional properly useful law than was given it in the charge. As stated in the dissenting Opinion:

“It is obvious that if Morris had committed the acts described in the hypothetical alternative in the charge so challenged alone by the court, he was in fact guilty. Hence there was no ‘miscarriage of justice’ and no occasion for a *sua sponte* consideration of the instruction.”

Courts have consistently refused to reverse upon questions of substantial impairment of constitutional rights because such questions were not seasonably raised. This Court applied the rule in *Rose v. United States*, 149 F. (2d) 755 (C. C. A. 9), where for the purpose of making its ruling the Court assumed a search and seizure illegal but declined to consider the point on appeal because it had not been raised at a timely point in the proceedings in the Court below. It seems consistent that a jurisdiction which places such a limitation upon the raising of a point of constitutional right infringement would hold that an acquiescence in the Instruction in the Trial Court cannot be a basis for a reversal when raised for the first time in the Appeal Court, particularly when the matter concerns one of style and form rather than one of substance. Had the defendant desired that the regulations be read or summarized, his request would have been for the simplest kind of action in that the Court could merely read the verbose language without any problem of composing an Instruction. It is noted that after Appellant’s counsel had

stated that there were no exceptions to the Instructions the Court invited counsel to approach the bench [R. 102] and stated:

“The Court: ‘Just because you haven’t been in the Federal Courts, I wondered if you intended to offer any objections to the instructions offered, because those exceptions you must make at this time.’

“Mr. Leake: ‘Yes, your Honor.’

“The Court: ‘Well, you will have to make them in open court as to each of the instructions.’

“Mr. Leake: ‘Thank you very much.’

“(Thereupon, the following proceedings were had within the hearing of the jury.)

“The Court: ‘I think counsel possibly misunderstood my statements about exceptions to the instructions given. I should have said instructions refused. We use that phrase, but we mean that it is to apply to those refused also, and for that reason I will ask now if counsel for either side have any exceptions to [39] any of the instructions proffered by them and not given by the court?’

“‘I will explain to the jury that counsel are required to present their views on the law to the court, and the court either adopts them, modifies them, or rejects them, and counsel are also required to indicate to the court before the jury retires any exceptions they may have to those instructions. It is the only place in the record they can show their dissatisfaction in order to state it later on in a higher court.’

“‘All right.’

“Mr. Leake: ‘Shall I refer to them by number?’

“The Court: ‘Yes, I know what they consist of.’”

Thereafter counsel did take exception to certain failures to charge but did not except to the Instruction defining the crime. He did not at any time offer an Instruction on this subject. In *Boyd v. United States*, 271 U. S. 104, appellant requested a certain addition to an Instruction which the Court granted. There is no reason to believe that the Court would not have granted the reading of the statute and the regulation had it been requested in this case. Complaint was made of the Instruction as finally given in the *Boyd* case but was not made until the matter reached the Appellate Court. The Supreme Court commented that the Instruction appeared ambiguous (p. 107). The Court finally ruled:

“We are justified in assuming that had the Court’s attention been particularly drawn at the time to the part complained of now, it would have been put in better form. Certainly after permitting it to pass as satisfactory then the defendant is not now in a position to object to it.”

This Court has held that objections to Instructions cannot be considered the first time on appeal. See *Yen-kaichi Ito v. United States*, 64 F. (2d) 73 (C. C. A. 9, 1933), wherein it is said:

“[9] Appellant seeks to have us consider other objections to the charge which he is urging for the first time on appeal. In the trial court no objection was made to the instructions on the grounds now urged and no exception reserved so these matters are not properly before us for review.”

See, also, *Traversi v. United States*, 288 Fed. 375 (C. C. A. 9, 1923), wherein it was said:

“[2] If it be conceded that the instructions might very properly have been more guarded in the respects now suggested, they were not plainly misleading, and not only did counsel for the plaintiff in error fail to object, but, upon inquiry of the court whether he desired anything further, he answered no. Not being convinced that an injustice has been done, we would not be warranted in sending the cause back for a new trial, for imperfections in instructions with which the parties were satisfied at the time they were given.”

To like effect see, *Paddy v. United States*, 143 F. (2d) 847 (C. C. A. 9, 1944); *Kendall v. United States*, 131 F. (2d) 431 (C. C. A. 5, 1942).

Title 28, U. S. C. 391:

“(Judicial Code, section 269, amended.) *New trial; harmless error.* All United States courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties. (R. S. 726; Mar. 3, 1911, c. 231, §269, 36 Stat. 1163; Feb. 26, 1919, c. 48, 40 Stat. 1181.)”

Conclusion.

Appellee respectfully submits that there are no authorities which hold that an Instruction in the form given in this case is not an Instruction of law and that on a review of the whole Record it must appear that substantial justice was done in the Trial Court.

The Appellee respectfully urges that this Honorable Court grant this Petition for Rehearing and that the Judgment of Conviction of the District Court be, upon further consideration, affirmed.

Respectfully submitted,

JAMES M. CARTER,
United States Attorney;

ERNEST A. TOLIN,
Assistant United States Attorney,
Attorneys for Appellee.

Certificate of Counsel.

We, counsel for the United States of America, Appellee in the above entitled cause, do hereby certify that the foregoing Petition for Rehearing of this cause in our opinion is well founded and is not interposed for delay.

JAMES M. CARTER,
United States Attorney;

ERNEST A. TOLIN,
Assistant United States Attorney,
Attorneys for Appellee.

No. 10969

United States
Circuit Court of Appeals
For the Ninth Circuit.

RALPH SWIHART,

Petitioner,

vs.

JAMES A. JOHNSTON, Warden, United States
Penitentiary, Alcatraz, California,
Respondent.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

FEB 21 1944

PAUL P. O'BRIEN,
CLERK

No. 10969

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the Northern District of California, Southern Division

H. C. No. 23604 G

In the Matter of

RALPH SWIHART,

Petitioner,

vs.

JAMES A. JOHNSTON, Warden United States Penitentiary, Alcatraz Island,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

The petition of Ralph Swihart respectively shows:

That he is illegally restrained of his lawful liberty, by color of authority of the United States; and in the immediate custody of James A. Johnston, Warden of the United States Penitentiary, Alcatraz California; which aforesaid penitentiary is within the jurisdiction of this Honorable Court.

STATEMENT OF FACT

On February 15th, an indictment number 22273, containing two counts, was returned against petitioner, in the United States District court for the Eastern District of Oklahoma. Said indictment alleged a violation of Section 409 of Title 18 U.S.C.A. In support thereof, made a part hereof, is a certified copy of said Indictment. Exhibit A.

On March 13th, 1940; on a Plea of Not Guilty, petitioner, Without The Constitutional Right, of Trial By Jury, was [1*] Found Guilty, and immediately sentenced to imprisonment, and to this day stands committed.

CONTENTION OF PETITIONER

That petitioner is now restrained of his lawful liberty, by color of authority of a court judgment, Without Force or Effect In Law, in that his conviction was obtained without due process of law, expressly in violation of the Fifth Amendment to the United States Constitution. In as much that He Pleaded Not Guilty—yet Had No Jury Trial, constitutionally guaranteed by Article III, Section Two, Par. Three, of the original United States Constitution, and reiterated in the Sixth amendment and emphasized in the Seventh amendment to the United States Constitution.

STATEMENT OF THE CASE

On March 13, 1940, counsel for petitioner William P. Gullatt, after repeated attempts to induce petitioner to sign a waiver to trial by jury had failed, he, counsel for petitioner conferred and agreed with the court, to waive petitioner's right to trial by jury. Such an agreement was made betwixt the court and prosecuting officials, by counsel for petitioner, to waive his constitutional right to trial by jury, and positively was not done in the presence of petitioner.

*Page numbering appearing at top of page of original certified Transcript of Record

When petitioner was returned to court after the noon recess, counsel informed petitioner of this arrangement, as to trial by judge. Petitioner vigorously protested before the [2] court of proceeding to trial without a jury, in words of a common layman. The Honorable Alfred P. Murrah, aforesaid District Judge, told petitioner that he did not have any malice against him; still petitioner protested and was sternly told by aforesaid judge, that he had counsel to defend him, and to set down.

Petitioner was not advised by the court of the arrangements made by counsel concerning the waiver of trial by jury, or was he advised of his constitutional right thereto, nor of the consequences contingent upon the dispensation of that right.

The trial before the Judge promptly began, while petitioner was completely confused by this unexpected and objectable turn of events. Thus bewildered he stood, amidst an unfriendly court, abashed and fearful of this perplexing situation; detrimental to his best interest, contrary to what was his will, and which was inconsistent with due process of law, and the express command of the United States Constitution; which, in and of itself, could not be construed by the wildest stretch of the imagination, as a competent, intelligent and voluntary waiver of a constitutional right.

In the leading cases upon this subject, the United States supreme court has held such a constitutional right cannot be waived, unless it be in writing, and signed by the defendant in the case; and such fact duly recorded in the records. That would, in the

opinion of ruling case laws, constitute an intelligent and competent waiver. Exhibit B and C. [3]

The natural sequence of such unorthodox procedure hastily followed, and the then presiding District Judge, Honorable Alfred P. Murrah, thereupon, within a matter of minutes, declared petitioner guilty, and imposed the maximum penalty; a total.....sentence of twenty years in a federal penitentiary.

PRAYER OF PETITIONER

Wherefore, petitioner prays this Honorable court for a Court order to the Respondent herein, Warden James A. Johnston, commanding him to release petitioner forthwith from further illegal custody; so petitioner will ever pray.

RALPH SWIHART

Petitioner, Pro. Se.

AFFIDAVIT OF VERIFICATION

Personally appeared before me Ralph Swihart, who after being first duly sworn, upon his oath deposes and says:

That he has read the contents thereof; and that they are true to the best of his knowledge & belief.

RALPH SWIHART

Affiant and Petitioner. [4]

Subscribed and sworn to before me, a notary public this 21 day of August, 1944.

Records at U. S. Penitentiary, Alcatraz, California, Indicate That Ralph Swihart Is A Citizen of The United States.

E. J. MILLER

Associate Warden,
United States Penitentiary,
Alcatraz, California.

[Seal]

.....

Warden—Associate Warden
Authorized by the Act of
February 11, 1938, to administer oaths. [5]

EXHIBIT "A"

22273

United States of America,
Eastern District of Oklahoma—ss.

In the United States District Court in and for the Eastern District of Oklahoma, at the regular January 1940 Term thereof, of Muskogee, in February.

The Grand Jurors of the United States of America, duly empaneled, sworn and charged in the District Court of the United States within and for the Eastern District of Oklahoma to inquire into and due presentment make of all offenses against the laws of the United States committed and triable in said District, do, upon their oaths, find, present and charge that on or about the 7th day of December, 1939, One

RALPH SWIHART,

whose more full, true and correct name is at this

time to the Grand Jurors unknown, then and there being, at Ada, in Pontotoc County, in the Eastern District of Oklahoma, and within the jurisdiction of this Court, did, wilfully, wrongfully, unlawfully and feloniously break seals No. 826, 350 and No. 833, 359 on the west side and the east side respectively of Milwaukee freight car No. 708,936 containing interstate shipments of freight, moving from Louisville, Kentucky, to Ada, Oklahoma, [6] under L. & N. waybill No. 80,181, and which was then and there in transit and had been conveyed as a part of an interstate shipment contained in the aforementioned railroad car, and which said railroad car and interstate shipment of freight therein was then and there in the possession, custody and control of the Oklahoma City-Ada-Atoka Railway Company, a corporation common carrier, when the seal on same was so wilfully, unlawfully, wrongfully and feloniously broken in Pontotoc County, in the Eastern District of Oklahoma, by the said defendant, without the knowledge or consent of the said Oklahoma City-Ada-Atoka Railway Company, or any person authorized to give such consent, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

/s/ CLEON A. SUMMERS

United States Attorney.

A true bill:

/s/ D. P. KENNEDY

Foreman. [7]

SECOND COUNT

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further find, present and charge that, on or about the 7th day of December, 1939, the said

RALPH SWIHART

whose more full, true and correct name is at this time to the Grand Jurors unknown, hereinafter referred to as defendant, at Ada, in Pontotoc County, in the Eastern District of Oklahoma and within the jurisdiction of this Court, then and there being, did, wilfully, wrongfully, unlawfully and feloniously enter Milwaukee freight car No. 708,936 containing interstate shipments of freight, moving from Louisville, Kentucky, to Ada Oklahoma, under L. & N. waybill No. 80,181, with intent to commit larceny therein, which said car contained merchandise shipped in interstate commerce from Louisville, Kentucky, to Ada, Oklahoma, and which had been in transit and had been conveyed as a part of an interstate shipment contained in the aforementioned railway car, and which said railway car and interstate shipment of personal property therein was then and there in the possession, custody and control of the Oklahoma City-Ada-Atoka Railway Company, a corporation common carrier, when so wilfully, wrongfully, unlawfully and feloniously entered, in Pontotoc County, in the Eastern District of Okla- [8] homa, by the said defendant, with intent to commit larceny therein, without the knowledge or consent of the said Oklahoma City-Ada-Atoka Railway Company, or any one authorized to

give such consent, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

/s/ CLEON A. SUMMERS

United States Attorney.

A True Bill:

/s/ D. P. KENNEDY

Foreman. [9]

United States of America,
Northern District of California

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify the foregoing to be full, true, and correct copies of the Indictment, Judgment and Commitment and Docket Entries re U.S. v. Swihart, No. 22273, Eastern District of Oklahoma, filed as Exhibits to the Petition for Writ of Habeas Corpus, in the matter of Ralph Swihart vs. James A. Johnston, Warden, United States Penitentiary, Alcatraz, No. 23016-R. as the same now remains on file and of record in this office.

Attest my hand and the seal of the said United States District Court, Northern District of California, at San Francisco, California, this 19th day of May, A.D. 1944.

Fee of \$2.15 paid.

[Seal]

C. W. CALBREATH

Clerk.

By C. M. TAYLOR,

Deputy Clerk. [10]

EXHIBIT "B"

340

Criminal—Docket 22273

THE UNITED STATES,

vs.

SWIHART, RALPH.

Attorneys:

.....

For U. S.

.....

For Defendant

Pontotoc

Larceny Interstate Shipment
Cash Received and Disbursed

Abstract of Costs	Amount	Date	Name	Received	Disbursed
		Month Day Year			

Fine,
Clerk,
Marshal,
Attorney,
Commissioner's Court,
Witnesses,
Proceedings

No. of Words Clerk's Fees
Plaintiff Defendant

Date

1940

Feb. 15—Filing Indictment. 5 00.

Feb 17—Order Mr. Shearer Brown Appt as Coun-
sel to advise Defendant, & Deft. duly
arrgd. & P.N.G. 5 00.

1940

Mar. 1—Filing praecipe & issuing subpoenas, 10 witnesses.

Mar. 6—Filing and Entering Marshal's Return on Subpoena: C. A. Conway served 3/4/40.

Mar. 6—Filing and Entering Marshal's Return on Subpoena: Floyd O. Clark served 3/4/40.

Mar. 6—Filing and Entering Marshal's Return on Subpoena: M. B. Fash & R. H. Colvin served 3/4/40.

Mar. 6—Filing Praecipe, Issuing Subpoenas 5 witnesses.

Mar. 12—Filing Praecipe, Issuing Subpoenas 2 Govt witnesses. [11]

Mar 13—Order said cause proceed to trial before the court the deft having waived in open court his constitutional right to trial by a jury and being represented by counsel Mr. William P. Gullatt.

Mar. 13—Entering verdict of guilty.

Mar. 13—Entering judgment & sentence-Deft sentenced to U.S. Pen Leavenworth for 10 years on count one (1) and 10 years on count 2 to be cumulative and begin at expiration of sentence on count (1). 5 00.

Mar. 13—Issuing commitment.

Mar. 27—Filing and Entering Marshal's Return on subpoenas L. L. Farram, served 3/9/40. A. R. Haggitt, Chas. Cosgrove, Glennie Cosgrove served 3/8/40, Lem H. Tillie served 3-11-40, Bee Pounce, G. W. Vandiveer, Lester Denny & Sam Wright & Lloyd Adams served 3-6-40.

1940

Apr. 1—Filing and Entering Marshal's Return on
Commitment: Deft to U.S. Pen. 3/25/40.

[12]

D. C.

On this 13 day of March 1940, the District Court of the United States for the Eastern District of Oklahoma, sitting in regular session at Ada, Oklahoma met pursuant to recess; Hon. Alfred P. Murrah, Judge, present and presiding the following proceedings were had to wit:

22273 Ralph Swihart (PNG) Larceny Iss.

Order said cause proceed to trial as to deft Ralph Swihart being represented by counsel Mr. William P. Gullatt and who in open court waives his constitutional right to trial by jury and agrees to try said cause to the Court, witnesses sworn and testimony introduced.

Plaintiff Rests.

1:30 to 3:17 Defendant demurs to evidence of the Plaintiff and is overruled by the Court.

Defendant Rests.

Enter Order of Court finding Defendant guilty on both counts of the indictment.

Enter Order Judgment Defendant Ralph Swihart sentenced to custody of Attorney General for 10 yrs. on count 1. & 10 yrs, on count 2 to begin at the expiration of the sentence on count 1.

Court Recessed Subject To Call. [13]

United States of America,
Eastern District of Oklahoma—ss.

I, John H. Pugh, Clerk of the United States District Court for the Eastern District of Oklahoma, do hereby certify that the annexed and foregoing is a true and full copy of the original Docket Entries and Minutes of March 13, 1940.

In re: United States of America, Plaintiff,
vs. Ralph Swihart, Defendant, Case No. 22273-
Criminal.

now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Muskogee, Oklahoma this 13th day of November, A.D. 1944.

[Seal]

JOHN H. PUGH

Clerk.

By J. J. CONRAD

Deputy Clerk. [14]

EXHIBIT "C"

Department of Justice
United States Attorney
Eastern District of Oklahoma
Muskogee, Oklahoma
July 31, 1944

Ralph Swihart,
Box No. P.M.B. 590
Alcatraz, California.

Dear Sir:

I have your letter relative to whether or not a waiver of a jury in your case was oral or in writing.

The records in this case is silent on this question, however, it has not been the custom in this District up to this time to have a waiver of jury made in writing, either by the Government or by the defendant. The records show that Mr. Sherar Brown was your attorney in this case and that the waiver of jury was made in open court.

Yours very truly,
(Signed) CLEON A. SUMMERS,
United States Attorney.

CAS:r.

The above is a true and accurate copy of the original as witnessed by me this 21 day of August, 1944.

E. J. MILLER

E. J. Miller,

Associate Warden,

United States Penitentiary,
Alcatraz, California. [15]

EXHIBIT "D"

United States District Court
Office of the Clerk
Eastern District of Oklahoma
Muskogee, Okla.,
July 14, 1944.

Mr. Ralph Swihart,
Box P.M.B. 590,
Alcatraz, California.

Re: Case No. 22273-Cr.

Dear Sir:

Receipt is acknowledged of your letter of June 30th with further regard to the above numbered case and in reply thereto, you are hereby advised that:

(1)—The files of this office do not show who the consignee was of shipment of goods billed under L & N waybill No. 80,181;

(2) Our files do not show who the consignor was nor his location and;

(3) Our files do not reflect of what the merchandise consisted so shipped under waybill No. 80,181.

It is sincerely hoped that the above statement will fulfill your request and that no further correspondence will be necessary in regards to the same.

There is no charge for making this statement,

therefore your check for \$1.50 is herewith returned to you with restricted endorsement thereon. [16]

Yours very truly,

(Signed) JOHN H. PUGH,

Clerk.

U. S. District Court.

By RANDOLPH KIZZIRE,

Chief Deputy.

RK:BL

Enclosure.

The above is a true and accurate copy of the original as witnessed by me the 21 day of August, 1944.

E. J. MILLER

E. J. Miller,

Associate Warden,

United States Penitentiary,
Alcatraz, California.

[Endorsed]: Filed in open court Feb. 15, 1940,
W. V. McClure, Clerk, U. S. District Court.

[Endorsed]: Filed Aug. 23, 1944. C. W. Calbreath, Clerk.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Good cause appearing therefor and upon reading the verified petition on file herein;

It Is Hereby Ordered that James A. Johnston, Warden of the United States Penitentiary, at Alca-

traz Island, State of California, appear before this Court on the second day of September, 1944, at the hour of 10 o'clock A.M., of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued herein, as prayed for, and that a copy of this order be served upon the said Warden of the United States Penitentiary, at Alcatraz Island, State of California, by mail and that a copy of the petition and this order be served upon the United States Attorney for this District, his representative herein.

Dated: August 24, 1944.

LOUIS E. GOODMAN

United States District Judge.

[Endorsed]: Filed Aug. 25, 1944. [18]

[Title of District Court and Cause.]

MOTION TO DISMISS PETITION FOR
WRIT OF HABEAS CORPUS

Comes now James A. Johnston, Warden of the United States Penitentiary, Alcatraz, California, through Frank J. Hennessy, United States Attorney for the Northern District of California, and moves to dismiss the petition for writ of habeas corpus on the ground that the reading of this petition in conjunction with the record in the prior petition in case No. 23016-R indicates that there is no merit therein, and that the same is insufficient to justify the issuance of a writ of habeas corpus. [19]

Dated September 16, 1944.

FRANK J. HENNESSY

United States Attorney

JOSEPH KARESH,

Assistant United States At-
torney,

Attorneys for Respondent.

MEMORANDUM OF POINTS AND AUTHORITIES

This is the second petition filed herein by the petitioner for a writ of habeas corpus in which he raises a jurisdictional question identical to that previously raised in a prior petition in Case No. 23016-R, to-wit: loss of jurisdiction of the trial court to proceed because the petitioner was forced to trial without jury and without proper waiver thereof, and while the alleged facts in support of his present petition are in conflict with those previously alleged, thereby indicating that the petitioner deliberately made a false and perjured pleading on one, if not both occasions, petitioner was accorded ample opportunity in the first hearing on a writ actually issued to present and prove facts showing that he had not waived a jury at the time of his trial and conviction, and there is nothing presented in or in support of his present petition to indicate that any useful purpose would be served by the issuance of a writ. [20]

Accordingly, it is respectfully submitted that the same should be denied. Otherwise habeas corpus

proceedings instituted by prisoners at Alcatraz will become a mockery.

See *Salinger v. Loisel*, 265 U. S. 224. *Mothershead v. King*, 37 Fed. Sup. 210, 213. U.S. ex rel *Bergdoll v Drum*, 107 Fed. (2d) 897, 899.

FRANK J. HENNESSY

United States Attorney.

JOSEPH KARESH

Assistant U. S. Attorney

[Endorsed]: Filed, Sept. 16, 1944. [21]

In the Southern Division of the United States
District Court for the Northern District of
California

No. 23604-G

RALPH SWIHART,

Petitioner & Movant

vs.

JAMES A. JOHNSTON, Warden, UNITED
STATES PENITENTIARY, ALCATRAZ,
CALIFORNIA,

Respondent.

MEMORANDUM OF PETITIONER.

IN OPPOSITION TO RESPONDENT'S MO-
TION TO DISMISS PETITION FOR WRIT
OF HABEAS CORPUS.

A petition for a writ of habeas corpus was sub-
mitted by this petitioner in propria persona to the

above named court, on August 22, 1944, and filed on or about August 24, 1944.

The respondent James A. Johnston, Warden was ordered to appear before the above named court on September 2, 1944, to show cause, if any he has, why a Writ of Habeas Corpus should not be issued herein, as prayed for.

The respondent asked for and was granted, a continuance until September 16, 1944. On that date, instead of the return To Show Cause, which the court had ordered the respondent to produce, the Respondent and his legal representatives, substituted a motion styled, "Motion To Dismiss Petition For Writ Of Habeas Corpus," in total disregard of the express requirement of Section 456 and 457 Of Title 28 U.S.C.A.

It is therefore within customary procedural standards of habeas corpus proceedings, that this petitioner respectfully urges this Honorable Court to dismiss respondent's premature motion, and to [22] order said respondent to proceed with the return to show cause, in conformity with statutes made and provided for.

The petitioner respectfully urges this Honorable court for the dismissal of said Respondent's "motion to dismiss," for the further and pertinent reasons To Wit:

I.

We find on page one of Respondent's "motion to dismiss"— "—there is no merit therein, and that the same is insufficient to justify the issuance of a writ of habeas corpus."

Now Respondent makes the illogical claim "there is no merit therein". For comparative analysis we quote petitioner's contention in his petition for writ of habeas corpus No. 23604-G, page one, last paragraph—

"That petitioner is now restrained of his lawful liberty, by color of authority of a court judgment, without force or effect in law; in that his conviction was obtained without due process of law, expressly in violation of the fifth amendment to the United States Constitution. Inasmuch that he pleaded not guilty—yet had no jury trial constitutionally guaranteed by Article III, Section II, Clause III, of the original United States Constitution, and reiterated in the Sixth Amendment and emphasized in the Seventh Amendment to the United States Constitution."

The petitioner "pleaded not guilty, yet had no jury trial," which constitutes a lack of and denial of, due process of law; yet counsel for respondent makes the singular claim, that such a contention has "no merit." [23]

We find on page 449 of C.J.S. Vol. 39 Habeas Corpus—Section 15—

"The principles stated in this section must be construed and applied so as to preserve, not destroy, constitutional safeguards of human life and liberty—".

Johnson v. Zerbst, Ga. 58 S. Ct. 1019;

Bridwell v Aderhold, 13 F. Supp., 253, and the use of the writ of habeas corpus has been held to extend to cases where convictions has been in dis-

regard of accused's constitutional or fundamental right's.

Pyle v. State of Kansas, 63 S. Ct. 177, 317 U.S. 213;

Cochran v. State of Kansas, 62 S. Ct. 1068, 316 U.S. 255;

Smith v. O'Grady, 61 S. Ct. 572, 312 U.S. 329;

Bowen v. Johnston, 97 F. 2d 860, Cert., granted—59 S. Ct. 98;

Johnson v. Zerbst, *Supra*;

MacDonald v. Hudspeth, C.C.A. Kan., 125 F. 2nd 465;

Egan v. Knewel, 298 F. 784;

Which result in the absence or loss of jurisdiction of the court and the writ is the only effective means of preserving those right——.

Waley v. Johnston, Cal., 62 S.Ct. 964, 316 U. S. 101;

While the foregoing rule has been applied, notwithstanding defendant failed to appeal——

Johnson v. Zerbst—*Supra*, Cert., granted 58 S. Ct. 610;

Bridwell v. Zerbst, 97 F. 2nd 992;

Habeas Corpus is the proper remedy——

“Where a judgment of conviction and sentence are had without due process of law.” [24]

Voight v. Webb D. C. Wash., 47 F. Supp. 743; Vol. 39 C.J.S. Section 26 Note 22 page 488;

Statutory proceedings dispensing with trial by jury, in violation of the Constitutional guaranty, do not constitute due process of law, and relief may be had by Habeas Corpus—page 520 Section

29 of Vol., 39 C.J.S. See also Section 29 C.J.S. page 48 Note 88.

The fifth amendment to the United States Constitution undeniable states—"No person shall be—deprived of life, liberty, or property, without due process of law."

It is therefore conclusively shown that the writ of habeas corpus is the only effective remedial relief available to this petitioner. It is believed legally, substantively and properly applied in harmony with his "contention" or "grounds for the granting of the writ."

II.

The respondent on page two of his "motion to dismiss" says in part——

"This is the second petition filed herein by the petitioner for a writ of habeas corpus in which he raises a jurisdictional question identical to that previously raised in a prior petition in case No. 23016-R."

We now quote petitioner's contention or grounds for the writ, as stated in case No. 23016-R, to which respondent makes the false claim that the contention therein is identical, as it is in the petition in case No. 23604-G, or the one before this Honorable Court at this instance.

In case No. 23016-R, or the former or prior case, the contention was as follows: page 1, item III:

[25]

"No probable, just, proper, or legal cause, why this petitioner should be in a Federal penitentiary

is in force, only in that the District Court usurped jurisdiction where it rightfully reposed in the state and county thereof, no palpable, factual or visible Federal crime existed, for your petitioner to be tried for.”

Now we quote petitioner’s contention embodied in the petition before this Honorable Court, or in case No. 23604-G (quoted in full on page 1, *supra*) of this mem.

By no stretch of the most vivid imagination could one construe these two contentions as being identical, of even remotely similar in point, which Respondent so earnestly, but erroneously, construes them to be.

That the first is distinctively a jurisdictional question is conceded beyond doubt, which was totally and wilfully disregarded, by wily resourceful counsel for Respondent, A. J. Zirpoli, before the Honorable United States District Court Judge, Michael J. Roche.

In the latter “contention,” of the instant case, now pending, it is distinctly and undeniably a constitutional question—fully guaranteed to all Americans by Article III of the United State Constitution.

This expressly states: “——all criminal trials shall be by jury——.” And Amendment Six plainly support that right in the following language:

“In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury.”

We continue on page two of Respondent’s “mo-

tion" where [26] respondent still is supposedly quoting from the petition in case No. 23016-R.

"—Petitioner was forced to trial without a jury and without a proper waiver thereof."

This is pure deliberate fabrication, set in Respondent's "motion," to distract, misguide, and mislead this Honorable Court as to the real issue; for in reality there is no such allegation, or any words, whereby such a construction or inference, could be adduced from movant's petition submitted in case No. 23016-R. It is quite evident that Respondent has, perhaps unintentionally, misconstrued the contention in case No. 23016-R, and the contention in case No. 23604-G, we only assume this, because such allegation does appear in the petition now pending before this Court.

In truth and reality the two petitions, in the former and the present action, are totally, factually and absolutely, unrelated on any point of the contention embodied in either, and by no means is the issue *res judicata*. The contention in this latter petition has not been ruled upon by the United States District Court in the prior action.

In order to further establish this assertion, we refer to the memorandum of opinion, handed down in that case by the Honorable Michael J. Roche, page four.

Mr. Zirpoli, questioning the petitioner:

"Q. Do you now contend that you waived your jury trial because of the fact that probation had been granted to you in the event you did that?

“A. By petitioner: I do not raise that point in my petition. [27]

“Q. Then you are not raising that point in your petition and you are not raising that point before the Court now?

“A. No.”

This plainly proves beyond doubt the issue of trial without a jury, was not a part of petitioner's prior contention. The fact of the matter is this assertion occurs in the petition in case No. 23016-R, under the heading “Statement of Fact,” which begins on page two of the petition in that case. This was a statement made by petitioner's attorney, and still is believed to be true, whether this was a true or erroneous statement by counsel, petitioner cannot say. It should not, for that reason loom as any issue, since it occurs under the “Statement of Fact.” It could hardly be construed as an allegation of the contention; since it was promptly denied as any part thereof, by the petitioner when the issue was raised by Mr. Zirpoli, page four of memorandum of opinion, in that case, No. 23016-R.

Respondent further claims, page two of his “Motion to Dismiss”:

“Petitioner was accorded ample opportunity in the first hearing on a writ actually issued to present and prove facts showing that he had not waived a jury at the time of his trial and conviction.”

This statement is barren of any truth, as proven by the memorandum of opinion in that case No. 23016-R, and above testimony.

If an issue is not raised how could one have

“ample opportunity to present and prove facts showing that he did not waive a jury——,” when one does not raise such an issue, as Respondent claims petitioner did in his first petition?

There is nothing whatsoever in movant’s first petition, or his [28] second petition, which is in conflict, nor does he “make a false and perjured pleading——,” as the respondent so imprudently charges.

Had the movant’s contention in his first petition, in case No. 23016-R, been justly and lawfully considered, instead of a deliberate evasion of the contention, and tangently misconstrued; then this petition, would in all probability not have been a necessity, for the petitioner would have had access to appeal, but one cannot appeal from a proceeding wherein the Court raised five points as the petitioner’s contention, when in reality there was but one, which can be simply stated:

“The trial court never had jurisdiction to proceed, since no Federal statute was violated.”

But the able and wily Assistant District Attorney, Mr. Zirpoli, did not scrutinize the petition with an intent upon justice, or open mindedness, but with an insidious impulse to search out some technical defect, to present before the Court, so petitioner would be denied the granting of the writ.

The respondent further claims in his “motion” —there is nothing presented in, or in support of his present petition to indicate that any useful purpose would be served by the issuance of the writ.”

Isn't such a statement in itself explanatory, that Respondent is not interested in according the relief, for which statutory provisions were enacted, for those deprived of their constitutional rights? A duty devolves upon the courts and its representatives, to redress any viloated constitutional right, thus called to their attention. [29]

The petitioner in submitting his petition in this case submitted therewith an exhibit "B" which constitutes the official records of the trial court. That exhibit plainly undeniably shows movant pleaded not guilty, yet had no jury trial.

That, and exhibit "C," positively further show he did not intelligently, competently and voluntarily waive that constitutional right. To constitute an intelligent waiver it must be in writing with the mutual consent of the Court. That has been held and applied as a basis for cases coming within such a category, by the United States Supreme Court so held in *Adams v. United States*, 62 St. Ct. 238;

Patton v. United States, 281, U.S. 276, 50 S. Ct. 253; *Schick v. United States* 195 U.S. 65, 24 S. Ct. 826; *Callan v. Wilson*, 127 U.S. 540, 8 S. Ct. 1301; *Thompson v. State of Utah*, 170 U.S. 343, 18 S. Ct. 620;

These authorities emphatically hold one cannot waive the constitutional right to trial by jury, unless he does so intelligently, competently, and voluntarily. Such a waiver was not made by this petitioner, and as stated under point one supra—resort to habeas corpus is the only effective and proper remedy.

III.

The respondent invokes as new and as yet the unsanctioned procedure in substituting a Motion to Dismiss before the Return to Show Cause is returned. This evidently is contrary to customary procedure, and no doubt is resorted to in order that petition be compelled to exhaust his authorities, in gaining the dismissal of such an unorthodox motion. [30]

In general a return must be made to the writ in accordance with the command of the writ and required by statute.

Ex parte Gutierrez, 36 p. 2d, 712, 1 Col. App. 2d, 281; Bagley v. Young, 134 p. 2d, 1098;

In habeas corpus proceedings, it is incumbent on the person depriving another of his liberty to show a right to do so.

On a motion to quash the writ, allegations of the petitioner are deemed admitted; Jensen v. Sevy, 134 p. 2d 1081; Vol. 29 C.J.S. page 154 Note 58.

In some jurisdiction it is held that the Court has no jurisdiction to proceed with the determination of an application for relief under a writ of habeas corpus in the absence of a return. Jensen v. Sevy, 134 p. 2d, 1081.

CONCLUSION

The petitioner would not be before this Honorable Court had he been accorded those constitutional rights, by the trial court of which he now complains. He was denied those rights of just procedural form and constitutional safeguards, and now seeks the

only relief available to him, to redress those violated rights.

Should the respondent or trial court feel justice is not being done, by the granting of a writ of habeas corpus in this case, it should be remembered, that the trial court, still would have jurisdiction to accord him a trial in conformity with the United States Constitution.

Wherefore, it is respectfully called to the attention of this Honorable Court that good and sufficient cause having been shown; [31] Respondent's "motion to dismiss the petition for writ of habeas corpus," should be dismissed, and Respondent ordered to make the return to show cause as law and justice requires.

Respectfully submitted,

RALPH SWIHART

Petitioner and Movant, Pro.
Se.

Dated this 27 day of September, 1944, at Alcatraz, California.

[Endorsed]: Filed Sep. 29, 1944. [32]

[Title of District Court and Cause.]

ORDER DENYING PETITION FOR WRIT OF
HABEAS CORPUS AND DISMISSING
PETITION

The verified petition for writ of habeas corpus filed herein on August 23, 1944 in substance alleges

that petitioner is unlawfully deprived of his liberty by respondent because his conviction in the United States District Court of the Eastern District of Oklahoma for violation of 18 U.S.C.A. 409 was contra to the Fifth Amendment of the Constitution in that despite his demand for jury trial, he was denied the same and was tried and convicted by the Judge of the Court. [33]

Ordinarily such an allegation would present a factual issue requiring the issuance of the writ and a hearing thereon.

The court issued an order directed to respondent requiring him to show cause why the writ should not issue. Respondent, in response, moved to dismiss the petition, alleging that on December 16, 1943, petitioner filed a verified petition for writ of habeas corpus herein (23016-R) wherein he asserted among many other matters, that he waived a jury trial in the Oklahoma case, in reliance upon an alleged promise, that if he were found guilty by the court, probation would be granted him. Upon hearing before Judge Roche in case #23016, petitioner abandoned the foregoing contention and introduced no evidence in support thereof. Judge Roche made written findings to such effect and dismissed the petition.

Thus petitioner under oath, has alleged in one petition that he waived a jury and in another petition that he was refused a jury despite his demand therefor. The writ of habeas corpus cannot be availed of to serve the purposes of a petitioner who has so little regard for the truth.

While the doctrine of *res adjudicata* does not apply in habeas corpus proceedings, nevertheless the court may deny the petition in reliance upon a prior refusal to issue a writ to the same applicant. *Salinger v. Loisel*, 265 U.S. 224. *Mothershead v. King*, 37 Fed. Suppl. 210. [34] Furthermore the issue raised herein could have been disposed of in case #23016-R, but was abandoned, *U. S. ex rel Bergdoll v. Drum* (Cir. 2) 107 Fed (2d) 897.

The petition for writ of habeas corpus is denied and the petition is dismissed.

Dated: October 3, 1944.

LOUIS E. GOODMAN

United States District Judge.

[Endorsed]: Filed Oct. 3, 1944. [35]

[Title of District Court and Cause.]

To the Honorable United States District Judge—
Louis E. Goodman.

MOTION FOR REARGUMENT UPON THE
PETITION FOR WRIT OF HABEAS
CORPUS IN CASE No. 23604-G

Movant herein respectfully petitions for a granting of reargument upon the petition for a writ of habeas corpus, as prayed for in petitioner's original petition for writ of Habeas Corpus, in case No. 23604-G; which said application was denied, by this Honorable court by an order duly entered in

the office of the clerk of the above named court, on the 3rd day of October, 1944. Upon the ground, and for the reasons, that this court in denying the application for the issuance of the writ of habeas corpus misapprehended and misconstrued the petitioner's contention, and the authorities cited; and entirely circuvented the issue raised in the petition on behalf of the petitioner; and the claims made on his behalf in the interest of substantial justice.

ARGUMENT

I.

Petitioner on December 16, 1944, filed a petition for writ of habeas corpus—case number 23016-R in which the contention was— [36]

“no probable, just, proper, or legal cause, why this petitioner should be in a Federal penitentiary is in force, only in that the District Court usurped jurisdiction, wherein it rightfully reposed in the state and county thereof, no palpable, factual or visible Federal crime existed for your petitioner to be tried for.”

Instead of the court sticking to the facts, they evidently searched the wording of the petition to find some words which they could convert into a contention of their own choosing.

On January 3, 1944, Respondent was ordered to show cause, and on February 16, 1944, the return to show cause was filed, and counsel for respondent therein first raised the contention, “that petitioner waived jury trial with the promise of probation,”

Point III page 2.

In the traverse to that return—page 2, point III-B—, We quote in full:

“Learned counsel for respondent magnifies as paramount point III of the return to order to show cause, which in reality is nothing more nor less a statement of fact showing the inducement which was employed, to obtain a jury waiver. It is not a separate point urged by your petitioner, but a mere part of the whole—and the whole is—that the United States District Court for the Eastern District of Oklahoma never had any vested lawful jurisdiction to try your petitioner.”

When the petitioner was brought before the court for the hearing of the writ, counsel for respondent again evaded petitioner’s contention, and again brought up the issue—on page five and six of the testimony taken down in that hearing—we quote verbatim—on page six—

Q. “Do you now contend that you waived your jury because of the fact that probation had been granted to you in the event you did that?”

A. “I do not raise that point in my petition.”

Q. “Then you are not raising that point in your petition [37] and you are not raising that point before the court now.”

A. “No.”

See also page 6 and 7 of Exhibit A, attached hereto and made a part hereof (memorandum of opinion in case No. 23016-R).

Judge Roche, in denying the granting of the writ, plainly sets out in the above exhibit A—page 6 and 7, that this was no contention of petitioner, but did believe in the first instance it was, but only because counsel for respondent deliberately raised that issue to mislead the court from petitioner's true contention. He denied the granting of the writ because of that fact—see point 5 of page 6, Exhibit A.

The petitioner in applying for the writ was sincere in his endeavor to set down all the facts, and circumstances to enable the court to obtain a comprehensive view, and understanding of the complete case.

The petitioner's reward for this diligence was a deliberate raising, by counsel for respondent, of at least five points of contention, wherein there was but only one. The result of that proceeding, for the application for a writ of Habeas Corpus, developed into a bedlam of scrambled contentions and confusion, which one could not, within reasonable limitations, appeal to an appellate court.

The process to obtain a writ of Habeas Corpus is not to confuse, or mislead, but get at the issue. The very case the court quotes against petitioner in the order denying petition for writ of habeas corpus—(No. 23604-G) namely—

Salinger v. Loisel, 44 S. Ct. 521 at page 521—*desig.* 230 [38] it says:

“As it is now, one record is largely a duplication of what appears in the other and both are exceedingly confusing. The course that

was taken should not have been selected, nor should the court have permitted it.”

Counsel for respondent also used this case against petitioner in his premature “motion to dismiss,” but it is strange he overloaded the above question, for in reality he succeeded to invoke the same condition of confusion in petitioner’s second application for a writ of Habeas Corpus.

The petitioner upon the stand in his hearing for the granting of the writ, in the first instance—case No. 23016R—stated his contention simply and earnestly in the words—

“That the court had no jurisdiction, the United States District Court for the Eastern District of Oklahoma did not have jurisdiction.”—see page 5 of transcript of testimony in that hearing—at 16-17.

Yet the court disregarded this contention and circumvented the issue by raising a statement of fact to a contention, which was deliberately and unscrupulously resorted to, in order that petitioner would be denied, and not with an eye towards justice for which it is presumed the courts of the United States were created—;

“Questions which merely lurk in the record neither brought to the courts attention, nor ruled upon, are not to be considered as having been so decided as to constitute precedents.” Perkins v. Endicott Johnson Corp. 128 F. 2d 208; Webster v. Fall 266 U.S. 507; 511, 45 S. Ct. 148, 149, 69 L. Ed. 411; Quong Wing v.

Kindendall, 223, U.S. 59, 64, 32 S. Ct. 192, 56 L. Ed 350.

II.

On August 22, 1944, petitioner applied for another writ of habeas corpus, this application was filed on or about August 24, 1944 and assigned to the Honorable Louis E. Goodman. [39]

An order to show cause was made returnable on the 2nd day of September 1944. On September 16, 1944 learned counsel for respondent, instead of the return to show cause, substituted and submitted a "motion to dismiss," which was not proper, nor in conformity with the Statutes governing the writ of habeas corpus. In this premature motion, Respondent raised the identical contention raised before Judge Roche, Case No. 23016-R, and totally disregarded the contention in the new action—23604-G. This is another obvious trait and trick to bemuse, ridicule, and confuse an innocent victim's recourse to the writ of habeas corpus. First counsel for respondent claimed the writ had no merit—page 2 of his "motion to dismiss," and then he changes this to say the writs from Alcatraz are becoming "a Mockery."

And why—only because the learned District Attorney cannot face the facts, or go by the express mandates of the Statutes which he is under oath to do, he seems to have a preconceived hate and prejudice for all Alcatraz inmates, forgetting the fact, that the Federal trial courts have made dozens of glaring mistakes, in illegal convictions and excessive sentences.

III.

The Honorable Judge Louis E. Goodman in his "order denying petition for Writ of Habeas Corpus and Dismissing Petition, seems to have considered only Respondent's "Motion to Dismiss the Petition for the Writ of Habeas Corpus."

The Petitioner filed a Memorandum in opposition asking therein to dismiss respondent's motion and stating apt procedural reasons thereof. This motion, for reasons only known to the court and [40] counsel for respondent, was not considered by the court. Had such been the case it would have been alluded to in the Order Denying Petition for Writ of Habeas Corpus, but nowhere therein is mention made of that fact. Such an opinion, by a court of competent jurisdiction, usually makes note of the actions to date, so one can assume, by such absence that the respondent's "motion" was heard and not the petitioners.

This is possibly so, because in the memorandum of petitioner and movant, page four—whole page, he again, and in no uncertain language, emphatically points out to the court the wilful and sinister subterfuge and by-pass, to circumvent the main issue raised in this latter petition, and petitioner reiterates again for the record, it was not a part of the first petition, only wherein the respondent and court tried to make it a part of that proceeding, by counsel for respondent, who again as in the first petition, attempts a similar movement of confusion and evasion, to mislead and confuse the records as to the main issue before the court.

For the sake of the records this petitioner wishes

to state that he had no—"trial by jury—yet pleaded not guilty." This was no contention in Writ—No. 23016-R, but was the only and singular contention in the petition for the writ of Habeas corpus in the instant case No. 23604-G.

Exhibit B and C attached to petitioner's petition for writ in case 23604-G bears out this contention.

A simple contention which raises an issue, but the court choose to complicate, confuse and belittle an innocent victim in search of justice. [41]

It is possible that the general administration of justice is contrary to the Statutes and the Constitution.

CONCLUSION

It is believed by this petitioner that a reargument should be permitted upon the hearing for the issuance of the writ of habeas corpus, as prayed for in the original petition to this honorable court.

Petitioner feels aggrieved, and rightfully so, that his memorandum in opposition to respondent's "Motion to dismiss," was not accorded a hearing before this court. Had it been so considered, the custom would have been for the issuance of the writ.

Wherefore good cause having herein been shown and factual reasons submitted, it is respectfully submitted that this motion for reargument should be granted in the furtherance of justice and proper American procedural form.

Respectfully Submitted,

RALPH SWIHART

Petitioner & Movant Pro. Se.

VERIFICATION

Personally appeared before me Ralph Swihart, who after being duly sworn, upon his oath, deposes and says:

That he has read the contents thereof, and herein, and that they are true to the best of his knowledge and belief.

That this motion is not filed for any purpose of delay or other reason of impediment.

RALPH SWIHART

Affiant and Movant.

Subscribed and Sworn to before me a Notary Public, this 16 day of October A. D. 1944. [42]

Records at U. S. Penitentiary, Alcatraz, California, Indicate that Ralph Swihart Is a Citizen of the United States.

[Seal]

E. J. MILLER

Associate Warden,

United States Penitentiary,

Alcatraz, California

Warden-Associate Warden authorized by the Act of February 11, 1938, to administer oaths. [43]

EXHIBIT 'A'

In the Southern Division of the United States
District Court for the Northern District of
California

No. 23016-R

RALPH SWIHART,

Petitioner,

vs.

JAMES A. JOHNSTON, Warden, United States
Penitentiary, Alcatraz, California,

Respondent.

Proceeding by Ralph Swihart against James A. Johnston, respondent, to secure release by habeas corpus from said respondent's custody.

Writ of habeas corpus discharged and petition for writ of habeas corpus dismissed.

Petitioner appearing in propria persona.

Frank J. Hennessy, Esquire, United States Attorney, and A. J. Zirpoli, Assistant United States Attorney, both of San Francisco, California, attorneys for respondent.

MEMORANDUM OF OPINION

Michael J. Roche, District Judge:

Ralph Swihart, a prisoner in the United States Penitentiary at Alcatraz Island, California, filed a petition for writ of habeas corpus by which he seeks his release from the custody of the respondent, James A. Johnston, Warden of the said penitentiary.

The petition is quite lengthy and extremely difficult to understand. Although petitioner evidently has access to a law library, [44] his failure to understand the matters cited by him, indicates that he is unlearned in the law and without understanding of the questions which may be properly presented by a petition for writ of habeas corpus. However, giving the petition the most favorable interpretation possible, it appears that petitioner's contentions are briefly as follows:

1. That the indictment, No. 22273, which purports to support his judgment of conviction, does not allege offenses against the United States;

2. That the trial Court (United States District Court for the Eastern District of Oklahoma) did not have jurisdiction of the person of petitioner or the subject matter of the indictment;

3. That the petitioner is not guilty of, and was not tried for, the offenses alleged in the said indictment;

4. That his conviction was secured by the use of evidence illegally obtained and by the failure to produce evidence essential to the proof of the case against him;

5. That he waived a jury trial and consented to be tried before the trial Judge only because of a promise that by doing so he would be given probation if convicted.

On this petition an order to show cause issued and the petitioner was granted a hearing thereon in which he appeared as the only witness.

This court, after considering the petition, the exhibits attached thereto, and the evidence, finds:

1. That the indictment charges offenses against the United [45] States in violation of Section 409 of Title 18, U.S.C.A., to-wit:

(1) The unlawful breaking of the seal of a freight car containing interstate shipments of freight, and (2) the entry of such car with intent to commit larceny therein;

2. That the trial court had jurisdiction over the person of petitioner and the offenses charged in the indictment;

3. That the petitioner was duly tried and convicted for the offenses alleged in the indictment, and his guilt or innocence of the crimes charged therein can not now be collaterally attacked by a petition for writ of habeas corpus.

Kelly vs. Johnston, (CCA-9), 128 F. (2d) 793, certiorari denied 317 U.S. 699; reh. den. 318 U.S. 798;

Osborne vs. Johnston, (CCA-9) 120 F. (2d) 947;

4. That even if true (without deciding it to be a fact) that petitioner's conviction was secured through the use of evidence illegally obtained and by the failure to produce other evidence essential (according to petitioner) to the proof of a case against him, such error is not correctable on habeas corpus.

Burrall vs. Johnston, (CCA-9) 134 F. (2d) 614, certiorari denied 319 U.S. 768;

Price vs. Johnston, (CCA-9), 125 F. (2d) 806, certiorari denied 316 U.S. 677, reh. den. 316 U.S. 712.

5. That the petitioner no longer contends that he waived a jury trial because of a promise that he would be given probation if convicted, and furthermore no evidence appeared in the record to support this contention. Had it not been for this last contention, the Court would not have granted the writ of habeas corpus and would have denied the petition because of insufficiency on its face. [46] The language of the petition which caused the issuance of the writ, reads as follows:

“On March 13, 1940, your petitioner went into the United States District Court, for the Eastern District of Oklahoma, Judge Alfred P. Murrah presiding and was thereupon met by counsel W. P. Gullatt who advised me as following:

‘I had a talk with the Judge and District Attorney, they both agree if you will waive a jury trial and take your chances before the judge, he has agreed to give you probation if you are convicted. I advise you to do that.’

Your petitioner, against his better judgment agreed to this, and accordingly was called to the bench and waived jury trial.”

However, at the hearing on the writ of habeas corpus he did not press this charge, as the following excerpt from the testimony before this Court clearly shows:

“Q. I want to ask you one further question Mr. Swihart. I notice in your petition that you make a contention——

The Court: What page?

Mr. Zirpoli: Page 4 of the petition. You state that on March 13, 1940, your petitioner went into the United States District Court for the Eastern District of Oklahoma, Judge Alfred P. Murrah presiding, and was thereupon met by counsel W. P. Gullat, who advised as follows: “I had a talk with the Judge and District Attorney: They both agree if you will waive a jury trial and take your chances before the Judge, he has agreed to give you probation if you are convicted. I advise you to do that.” Your petitioner, against his better judgment, agreed to this, and accordingly was called to the bench and waived jury trial. The testimony then presented follows’. Do you now contend that you waived your jury trial because of the fact that probation had been granted to you in the event you did that?

A. I do not raise that point in my petition.

Q. Then you are not raising that point in your petition, and you are not raising that point before the court now?

A. No.”

Since petitioner no longer contends that he waived his right to a jury trial because of a promise of probation for so doing and [47] has offered no proof in support of this contention, and since the convicting Court had jurisdiction over the offense

charged and the person of petitioner, it can not be said that that Court lacked jurisdiction in the premises or lost the same in the course of the proceedings.

Wherefore, in accordance with the foregoing, It Is Ordered, Adjudged and Decreed, that the writ of habeas corpus issued herein. be, and the same is, hereby denied; that the petition for writ of habeas corpus filed herein be, and the same is, hereby dismissed, and that petitioner be, and he is, hereby remanded to the custody of respondent.

This memorandum opinion may be deemed for all purposes wherein necessary as the Findings of Fact and Conclusions of Law of this Court.

Dated: May 2, 1944.

MICHAEL J. ROCHE

United States District Judge

A true copy.

E. J. MILLER

Associate Warden.

[Endorsed]: Filed Oct. 18, 1944. [48]

[Title of District Court and Cause.]

ORDER

Ordered petitioner's motion for reargument and rehearing herein is denied.

Dated: October 25, 1944.

LOUIS E. GOODMAN

United States District Judge

[Endorsed]: Filed Oct. 25, 1944. [49]

United States District Court, Northern District of
California, Southern Division

H. C. No. 23604—G

UNITED STATES OF AMERICA ON THE
RELATION OF RALPH SWIHART,

Relator-Appellant

vs.

JAMES A. JOHNSTON, Warden, United States
Penitentiary, Alcatraz, California.

Respondent-Appellee

NOTICE OF APPEAL

Sirs:

Please Take Notice, that the above named Relator Hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the Order of the United States District Court for the Northern District of California, entered in the office of the Clerk of said court on the 3rd day of October, 1944, dismissing the petition for writ of Habeas Corpus, and from each and every part of said order as well as from the whole thereof.

Dated this 4 day of December, 1944.

Respectfully submitted,

RALPH SWIHART

Relator-Appellant, Pro. Se.

P.M.B. Box 590 AZ.,

Alcatraz, California.

[Endorsed]: Filed Dec. 7, 1944. [52]

District Court of the United States, Northern
District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing 57 pages, numbered from 1 to 57, inclusive, contain a full, true and correct transcript of the records and proceedings, as enumerated in the Praecipe for Transcript of Record, in the matter of Ralph Swihart, Petitioner, vs. James A. Johnston, Warden, United States Penitentiary, Alcatraz, California, Case No. 23604 G on Habeas Corpus, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$15.50, and that the said amount has been paid to me by the Appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 20th day of January, A.D. 1945.

[Seal]

C. W. CALBREATH,
Clerk.

By M. E. Van BUREN

Deputy Clerk. [58]

[Endorsed]: No. 10969. United States Circuit Court of Appeals for the Ninth Circuit. Ralph Swihart, Petitioner, vs. James A. Johnston, Warden, United States Penitentiary, Alcatraz, California, Respondent. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed: January 20, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10969

RALPH SWIHART,

Appellant,

vs.

JAMES A. JOHNSTON, Warden, United States
Penitentiary, Alcatraz, California.

Appellee.

Appeal from the District Court of the United
States for the Northern District of
California

STATEMENT OF POINTS

These Are Habeas Corpus Proceedings.

Petitioner, on March 13th 1940, was sentenced

to twenty years in the custody of the attorney general on two counts of indictment No. 22273. Said indictment alleged a violation of Section 409 of Title 18 U.S.C.A.

On a plea of Not Guilty, Petitioner, Without the Constitutional Right of Trial by Jury, was pronounced guilty by the District Judge presiding, Alfred P. Murrah, the then Federal District Judge for the Eastern District of Oklahoma.

I.—In petitioner's application for a writ of habeas corpus, which was filed August 23, 1944, in the United States District Court for the Northern District of California, an order to show cause was issued to respondent, who failed to comply therewith, and instead, the court permitted counsel for Respondent to enter a "motion to dismiss," which was contrary to the statute governing Habeas Corpus proceedings.

II.—The said above named court did not consider the issue raised in petitioner's application, but circumvented an adjudication thereupon by reference to a prior application, which had no distinct relation to the issue raised.

III.—The issue, whether a person can be arbitrarily adjudged guilty by one man, when he pleaded not guilty and was denied the right to trial by jury; when the records show he did not

competently, intelligently, or voluntarily waive that constitutional right.

Respectfully submitted,

RALPH SWIHART

Pro. Se.

Appellant,

Alcatraz, Calif.

Dated: day of, 1944.

[Endorsed]: Filed, Jan. 20, 1945. Paul P.
O'Brien, Clerk.

No. 10,969

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

In the Matter of:

RALPH SWIHART,

Appellant,

VS.

JAMES A. JOHNSTON, Warden, United States
Penitentiary, Alcatraz Island, California,

Appellee.

APPELLANT'S OPENING BRIEF.

RALPH SWIHART,

Box P.M.B. 590 AZ, Alcatraz Island, California,

Appellant in Propria Persona.

FILED

MAR 21 1945

PAUL P. O'BRIEN,
CLERK

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No. 10,969

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of:

RALPH SWIHART,

Appellant,

vs.

JAMES A. JOHNSTON, Warden, United States
Penitentiary, Alcatraz Island, California,

Appellee.

APPELLANT'S OPENING BRIEF.

STATEMENT OF JURISDICTIONAL FACTS.

This proceeding was initiated on August 24, 1944, by the filing, with the United States District Court, for the Northern District of California, Southern Division, of a petition for a writ of habeas corpus (T. 2), by Ralph Swihart, the appellant herein.

On October 3, 1944, the said District Court entered its order denying appellant's application for the writ (T. 30). Appellant has appealed from said order, and this brief is in support of his appeal.

The petition was filed in the said District Court pursuant to the provisions of Title 28 U.S.C.A. Section 451 et seq., conferring powers on the Federal District

Courts to issue writs of habeas corpus, and pursuant to those of Title 28 U.S.C.A. 452, conferring powers on the several judges of the District Courts to grant said writs for the purpose of inquiring into the cause of restraint of liberty.

RELIEF MAY BE HAD BY HABEAS CORPUS, WHERE STATUTORY PROCEEDINGS DISPENSING WITH TRIAL BY JURY, IN VIOLATION OF THE CONSTITUTIONAL GUARANTY, since this constitutes a DENIAL OF DUE PROCESS OF LAW.

C. J. S. 39, Section 29, page 520, Note 67;

C. J. 29, page 48, Note 88.

Habeas corpus is the proper remedy—

“Where a JUDGMENT of CONVICTION and sentence are had WITHOUT DUE PROCESS OF LAW.” (Emphasis supplied).

Voight v. Webb, 47 F. Supp. 743;

In re Monroe, 46 F. 52;

C. J. S. 39, Section 26, Note 22, at page 488.

Habeas corpus is the proper remedy where constitutional rights were denied in the trial court, such proceeding invalidates the judgment.

Mitchali v. Youell, 130 F. 2d 880;

Boyd v. Hudspeth, 126 F. 2d 585;

Casebeer v. Hudspeth, 114 F. 2d 789.

The appellate jurisdiction of this court is derived from the provisions of Title 28 U.S.C.A., Section 463, providing that in a proceeding in habeas corpus in a District Court, the final order shall be subject to review

on appeal by the Circuit Court of Appeals of the circuit wherein the proceeding is had. Such appellate jurisdiction was invoked by appellant by the filing of a notice of appeal (T. 47), under the procedure established by Rule 73 of the Federal Rules of Civil Procedure, and rendered applicable to appeals in habeas corpus proceedings by Rule 81 of said Rules. The filing of the said notice of appeal was made within the time fixed by the provisions of Title 28 U.S.C.A., Section 230; the entry of the order of the said District Court denying the petition (T. 30) having been made on October 3, 1944, and appellant's notice of appeal (T. 47) having been filed on December 7, 1944.

**STATEMENT OF THE LAW AND THE
QUESTIONS INVOLVED.**

Appellant was charged, in an indictment (T. 6), filed in the United States District Court for the Eastern District of Oklahoma, with violation of Title 18 U.S.C.A. Section 409. Said indictment, containing two counts charged, *inter alia*, breaking the seals of a freight car containing interstate commerce.

Upon a plea of not guilty, and WITHOUT ENTERING A COMPETENT, INTELLIGENT, OR VOLUNTARY WAIVER OF HIS CONSTITUTIONAL RIGHT, TO TRIAL BY JURY, was declared guilty by the then presiding District Judge, Alfred P. Murrah, who promptly sentenced appellant to ten years on each count, sentences to run consecutively and to this day he stands committed.

Upon August 24, 1944, the appellant filed in the United States District Court for the Northern District of California, Southern Division, a petition for a writ of habeas corpus, alleging that he was unlawfully restrained of his liberty by imprisonment in the United States penitentiary at Alcatraz Island, California, under the custody of the respondent, James A. Johnston, warden of said penitentiary in violation of that portion of the Fifth Amendment to the United States Constitution, which provides that all judicial action shall be by due process of law. This situation was created when he PLEADED NOT GUILTY—YET HAD NO JURY TRIAL, CONSTITUTIONALLY GUARANTEED BY ARTICLE III, SECTION II, CLAUSE III, of the original Constitution, and reiterated in the SIXTH AMENDMENT to the United States Constitution.

On October 3, 1944, the said District Court denied appellant's application for the writ (T. 30). Therefore, the only issues raised by this appeal are:

(1) Did the United States District Court, for the Northern District of California, Southern Division act in conformity with, and adhere to statutory law, in permitting counsel for respondent to substitute a "motion to dismiss" in place of the return to the order to show cause?

(2) Is it within the judicial ambit and statutory law, for a United States Federal Court to deny the application for a writ of habeas corpus, without any adjudication whatsoever upon the issue raised?

(3) The fact, fully verified by the record (T. 10-14) that appellant PLEADED NOT GUILTY, YET HAD NO TRIAL BY JURY, which is expressly guaranteed by the United States Constitution, and where the RECORD FURTHER SHOWS he did not make a COMPETENT, INTELLIGENT, OR VOLUNTARY WAIVER THEREOF; can it be lightly brushed aside in an application for a writ of habeas corpus as having "no merit".

ASSIGNMENT OF ERRORS.

Assignment Number I.

The United States District Court for the Northern District of California, erred in permitting counsel for respondent to interpose a "motion to dismiss", when respondent was ordered to make the return to the order to show cause.

Assignment Number II.

The court below erred by circumventing the issue raised in the petition for writ of habeas corpus, by referring to a prior application, when the points raised in that application had no similarity to the contention in the present petition.

Assignment Number III.

The court below erred in failing to determine appellant's contention as to whether he competently, intelligently and voluntarily WAIVED HIS CONSTITUTIONAL RIGHT TO TRIAL BY JURY.

SUMMARY OF POINTS ON APPEAL.

Appellant contends that he was arbitrarily convicted, without due process of law, expressly in violation of the Fifth Amendment to the United States Constitution; in that he pleaded not guilty, yet had no trial by jury, nor did he competently, intelligently or voluntarily waive that constitutional right (T. 14).

Appellant further contends that in his application for the writ of habeas corpus it was the duty of the District Court, and devolved upon the judicial function thereof, to determine the issue therein, as law and justice require.

He endeavors to show, in the following three points, that manifest error was committed by the United States District Court, for the Northern District of California, Southern Division, in denying him the relief prayed for, in his original petition for the writ of habeas corpus.

ARGUMENT.

POINT I

On August 24, 1944, there was filed, in the United States District Court, Northern District of California, Southern Division, a petition for a writ of habeas corpus on behalf of appellant (T. 2).

The respondent, James A. Johnston, warden, was ordered to appear before the above named court on September 2, 1944 (T. 16), to show cause, if any he had, why a writ of habeas corpus should not issue therein as prayed for in the application.

The respondent asked for, and was granted, a continuance until September 16, 1944, on that date, instead of the return to the order to show cause, which the court had ordered the respondent to produce, the respondent and his legal representative substituted a motion styled "Motion to dismiss petition for writ of habeas corpus" (T. 17), in total disregard of the statutes governing habeas corpus proceedings. Section 456 of Title 28 U.S.C.A. provides in part (T. 35-36):

"Any person to whom such writ is directed shall make due return thereof within three days thereafter, unless the party be detained beyond the distance of twenty miles * * *."

It is understood the above was designed to remedy procrastination and trifling with the writ.

In Section 457 of the same title we find:

"The person to whom the writ is directed shall certify to the court, or justice, or judge before whom it is returnable the true cause of the detention of such party."

Failure to obey the command of the writ constitutes contempt of court, and an attachment will issue to compel obedience, *Ex parte Young*, 50 F. 526; *U. S. v. Bollman*, F. Cas. 14, 622.

"Disobedience of a writ of habeas corpus by the person against whom it is directed, such as the neglect or refusal to produce the prisoner or make a return, or the making of a false, impertinent, or evasive return, constitutes a contempt of court * * *."

C. J. S. 39, Section 96, page 661.

There is no basic reason, nor can any authorities be found, to sanction the procedure invoked by counsel for respondent. We wish to add that such procedure does not facilitate nor dispose of an issue, but tends to complicate and hold in flippancy the scope and purposefulness of the statutes governing habeas corpus proceedings.

Appellant is of the belief, and the authorities bear him out, that the court should not have allowed a motion to interpose between the order to show cause and the return thereto. This was duly and emphatically objected to by appellant in memorandum of petitioner (T. 19-32).

In general, a return must be made to the order to show cause in accordance with the command of the writ and required by statute.

Ex parte Gutierrez, 36 P. (2d) 712, 1 Cal. App. (2d) 281;

Bagley v. Young, 134 P. (2d) 1098.

When an order of a court of competent jurisdiction is issued, it is presumed such must be carried out in pursuance to that court's instruction. If this were not so, and strictly abided by, the courts could not maintain their established degree of dignity and respect. If the party so ordered by a federal court, disregards any order emanating from such court, it is manifest he can be cited for contempt of that particular court. Therefore, when the Honorable District Judge, Louis E. Goodman, ordered the respondent to make a return to the order to show cause, which he

failed to do, was it not disregarding an order of that court? Was it not statutorily wrong for the court to sanction such procedure by allowing the respondent to eliminate this part of habeas corpus proceedings and prematurely having the petition for the writ denied?

POINT II.

In the memorandum of opinion denying the petition for the writ of habeas corpus (T. 30), the court said:

“* * * the doctrine of *res adjudicata* does not apply in habeas corpus proceedings, nevertheless the court may deny the petition in reliance upon a prior refusal to issue a writ to the same applicant—*Salinger v. Loisel*, 265 U. S. 224; *Mothershead v. King*, 57 Fed. Supp. 210. Furthermore the issue raised herein could have been disposed of in case No. 23016-R, but was abandoned.”

Appellant in his memorandum in opposition to respondent's motion to dismiss (T. 19), in no uncertain language made known to the court that his second petition for the writ, was in no way connected or similar to the first writ for which he applied. In truth and reality the two petitions, in the former and present are totally, factually and absolutely, unrelated on any point of the contentions embodied in either, and by no means is the issue *res judicata*. The contention in this latter petition has not been ruled upon by the United States District Court for the Northern

District of California in the prior nor the present action.

In order to further establish this assertion we refer to the memorandum of opinion handed down in that case by the Honorable Michael J. Roche (page 4) (T. 41).

Mr. Zirpoli questioning the petition:

“Q. Do you now contend that you waived your jury trial because of the fact that probation had been granted to you in the event you did that?

A. (Petitioner). I do not raise that point in my petition.

Q. Then you are not raising that point in your petition and you are not raising that point before the court now?

A. NO.”

This plainly proves beyond doubt the issue of TRIAL WITHOUT A JURY WAS NOT A PART OF PETITIONER'S PRIOR CONTENTION. The fact of the matter is such an assertion occurred in the petition in case No. 23,016-R, under the heading “Statement of Fact”, which begins on page two of the petition in that case. This was a statement made by petitioner's attorney, and still is believed to be true, whether it was a true or erroneous statement by counsel; appellant cannot say. It should not, for that reason, be pyramided as any issue, since it occurred under the “Statement of Fact”. It could hardly be construed as an allegation of appellant's contention; since it was promptly denied as being such when Mr. Zirpoli, counsel for respondent, raised the question (see above and also T. 44 desig. 5).

Appellant did not appeal from the denial of his first petition for the writ truthfully because the United States District Court for the Northern District of California subverted the issue and created five allegations, wherein there was but one. Appellant in applying for the writ was sincere in his endeavor to set down all the facts and circumstances to enable the court to obtain a comprehensive view and thorough understanding of the case. The reward for this diligence was a deliberate raising by counsel for respondent of at least five points of contention, wherein there was but one. The result of that proceeding developed into a bedlam of scrambled contentions and confusion, which one could not, within reasonable limitations appeal to an appellate court.

Honorable Judge Roche said in case No. 23,016-R: "The petition is quite lengthy and extremely difficult to understand (T. 42 top)."

In the order denying the second application (T. 30), the Honorable Louis E. Goodman said: "Furthermore the issue raised herein could have been disposed of in case No. 23,016-R, but was abandoned". Is it possible to settle a question or issue that is not raised in a petition?

In the identical case the court quoted against appellant appears the following:

"* * * The process to obtain a writ of habeas corpus is not to confuse, or mislead, but get at the issue. * * * as it is now, one record is largely a duplication of what appears in the other and both are exceedingly confusing. The course that

was taken should not have been selected, nor should the court have permitted it.”

Salinger v. Loisel, 44 S. Ct. 521, at page 521
desig. 230.

By the great preponderance of authority the principle of *res judicata* has no application to habeas corpus proceedings where there is a refusal to discharge; a decision on one writ is no bar to subsequent proceedings.

The United States Supreme Court said in *Winder v. Coldwell*, 14 How. 434, 14 L. Ed. 487:

“Whether this is the second or twenty-second application, however, is immaterial. Under the Statutes as they stand, it seems to be left for the petitioner alone to determine, not only how many times he will apply for the writ and whether he will appeal from its denial * * *.”

In habeas corpus proceedings it is a duty devolving upon the judge to “get at the facts of the issue and determine the accuracy thereof”. In the instant case this was not done, instead reliance was placed upon a prior petition, wherein no such issue was alleged. The Honorable Judge Louis E. Goodman said (T. 31) petitioner had “no regard for the truth”, which seemed to be a convenient exit, or shirking of the statutory requirements. It is natural when an allegation is not made that a petitioner would offer no evidence thereto. The “no jury trial” allegation appeared in petitioner’s last application for the writ of habeas corpus, and no attempt was made to ascertain

the truth or falsity of the trial court records, which should have been determined (T. 10).

It is believed by the weight of authority that the United States District Court for the Northern District of California erred in the first instance:

(1) By not compelling respondent to make a return to the order to show cause;

and (2) in refusing to make a determination upon the issue presented.

SUMMARY OF POINT III.

Appellant proposed to show that he did not COMPETENTLY, INTELLIGENTLY, NOR VOLUNTARILY WAIVE HIS CONSTITUTIONAL RIGHT TO TRIAL BY JURY. The facts plainly show that he did not know, or was he informed of the consequences contingent upon such unsanctioned procedure.

Therefore, but one issue was raised by his contention.

Was appellant accorded his constitutional right to trial by jury? The records of the trial court plainly show that he did not have a trial by a jury, in spite of the fact that he pleaded not guilty. The record does purport to show this right was waived, but it does not show that it was intelligently waived.

The authorities quoted in the following point positively, and definitely, hold one cannot waive his con-

stitutional right to trial by jury, in a criminal case, unless that is done by express stipulation in writing; which is the only means of making a competent and intelligent waiver.

POINT III.

The certified docket entries of the trial court (T. 10), purport to show appellant in "open court waived trial by jury." If this be a fact, the same record, would of a necessity, show a stipulation in writing, signed by appellant and approved by the court, agreeing to such unsanctioned procedure? We must confess that the record is totally barren of any such waiver in writing (T. 14.) The rule has been rigidly invoked by the United States Supreme Court in the three leading cases to come before them (*Schick v. United States*; *Patton v. United States*; *Adams v. United States*, *infra*), that the record must show a signed waiver by the defendant, approved by the court for the waiving of the constitutional right to trial by jury. That it was a necessary implement to guarantee the fulfilment of due process of law.

The same entries (T. 10), charge larceny of an interstate shipment; that indictment (T. 6), does not allege any such fact. The same entries do not show one, partial, or bit, of any exhibit offered by the government in the trial of this cause; nor does it show the express statutory requirement in such a case (Title 18 U.S.C.A. Section 411), without which a conviction cannot be

had, unless that is the government's chief exhibit, to establish the interstate character of such an alleged offense. (T. 15.)

In the petition for the writ (T. 2), it was alleged, no competent, intelligent or voluntary waiver was made, nor was there any waiver, nor stipulation thereto, made in writing.

This brings us to the all important query as to what constitutes a competent, intelligent and voluntary waiver?

“A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.”

So defined in *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019; and in Webster's New International Dictionary, Second Edition, we find the three words:

A—Competent:

Answering to all requirements; adequate; sufficient; suitable; capable; qualified; fit.

B—Intelligent:

Endowed with intelligence or intellect, (2d) possessed of, or exhibiting, a high or fitting degree of intelligence or understanding.

C—Voluntary:

Proceeding from the will, or from one's own choice or full consent.”

In summing up the substantive implication in A—B—C— We find this appellant could not have, under

the circumstances, met the degree of qualification prerequisite to the requirement of A, B, C, for these visible reasons:

1. He did not make an adequate, sufficient, suitable, capable, qualified, or fit waiver of a jury trial.

2. He was not endowed with that degree of intelligence, or possessed of, or exhibiting a high or fitting understanding of the issue involved to sufficiently remonstrate at the denial of trial by jury.

3. He did not waive a jury trial, proceeding of his own volition, or from his own choice or consent.

We then find in a comparative analysis with the view adopted by the United States Supreme Court, who have held one could waive a known constitutional right, if the same is done in, "a competent, intelligent and voluntary manner," that this appellant did not make, or enter into, any such waiver, nor by the widest stretch of the imagination could one distort the facts and claim the contrary.

"The question in each case is whether the accused was competent to exercise an intelligent, informed judgment * * *."

Adams v. United States, 63 S. Ct. 241.

If we were to assume the jury was waived in writing, a presumption wholly unsupported by the record

(T. 10, 14), then and only then, could it be said an intelligent waiver was made. An invisible record, beyond proof, under such circumstances nevertheless true, and demonstrated to by the facts of the case, show some sort of waiver was made by counsel and the Court regarding the appellant's constitutional right to "trial by jury." which was beyond the comprehension of appellant.

The severe sentence imposed by the Court; the harsh language used and the denial of appellant's witnesses to testify, cannot be said that an intelligent waiver was made by this appellant.

The power of a judge to pass upon questions of law is just as much an essential part of the process of trial by jury in criminal law, as are the powers of the jury to pass upon question of fact. In such a trial in a Federal Court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. This discharge of the judicial function of federal law is an essential factor in the process for which the United States Constitution provides, and it distinctly does not provide that a person shall be denied the right to trial by jury in a criminal cause, when such right is fully guaranteed by Article III, Section II, Clause III of the United States Constitution.

We stress this matter because of the grave importance of fact finding. The finding of fact by the trial court was haphazard, conjectural and not based upon any proof (T. 15).

Facts found without due care as well as unscrupulous fact-finding is not, as a rule, condoned by the federal courts, but we must confess the trial Court, in the instant case, if the records are to be relied upon, certainly, and perhaps deliberately, went far astray from judicial principles in vogue within the federal courts, to obtain the conviction of this appellant before a one man jury.

When a federal trial judge sits without a jury, which has not competently, or intelligently been waived, and determines the facts upon a generalization of "his beliefs," and perhaps a "dislike of the defendant," you would have a realistic performance of arbitrary power as exercised in isolated cases. Such unsanctioned procedure can only be corrected upon a retrial of those issues denied in the first instance. Appellate Courts have power to remand such a voidable conviction not inconsistent with their conclusiveness.

To determine the precise degree of prejudice sustained by appellant as a result of such compulsory waiver, one need only look at the judgment entered and sentence imposed which is cruel and inhuman, considering the insufficiency of evidence as a whole. A defendant who has been wronged by being judged without the appliance of his constitutional right is entitled to an adjudication upon those issues.

The trial court's failure to inform appellant of his constitutional right to trial by jury, subsequent to the calling of the case for trial, was in violation of Article III, Section II, Clause III and plainly stated in the Sixth Amendment, and not aligned with due process

of law as defined in Amendment Five of the United States Constitution.

It is a fact that the right involved is of such a fundamental and inherent character, it cannot be dispensed with, without violating those preceptible principles of liberty and justice, which are the foundation of all our civil and political institutions.

Yet the facts are plainly evident the trial court lightly brushed this basic right aside in zealous haste for a conviction, in utter disregard of a citizen's right, or "just recourse to the law."

The Sixth Amendment to the United States Constitution guarantees that:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury."

This is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. It being considered of such paramount importance that the original framers of the United States Constitution incorporated it in Article III, and later Congress inserted it in the Sixth and Seventh Amendments respectively, to triply insure against its abuse, or oversight. It stands thus, as a silent sentinel, a constant vigilance admonishing the courts to dispense justice as ordained in its mandates, and that if the constitutional safeguards it provides be circumvented, by vague calculations of hypothetical inferences, justice then will have been lost, and constitutional meanings will have become

ubiquitous inferences interchangeable with momentary needs.

The principles laid down in this historic document (the Constitution of the United States), embodies a realistic recognition of the obvious truth—that one charged with a crime, however intelligent, able and forward he may be, is not to be permitted to waive the inherent command, “the right of trial by jury shall be preserved”, it does not appear to be intricate, complex or mysterious, and the right would be of no avail if a court could wantonly disregard such a mandate at will.

It is believed that the Sixth Amendment withholds from Federal Courts, in all criminal proceedings, the power and authority to deprive an accused of life or liberty unless such rights, after being informed by the court, are competently, intelligently and freely waived. The constitutional right of accused to a trial by jury, where he pleaded not guilty, and did not competently waive such right, invokes of itself, the protection of a trial court. This protecting duty imposes the weighty responsibility upon the trial judge of determining whether there has been an intelligent and competent waiver made by the accused, it would seem to be fitting and appropriate for such determination to appear upon the record; (*Dillingham v. United States*, *infra*). ,

If this requirement of the Fifth Amendment (lack of due process of law), and the requirement of Article III, Section II, Clause III and Amendment Six, are not complied with, the court no longer has jurisdic-

tion to proceed, making the judgment of conviction pronounced by such a Court absolutely void, and one imprisoned thereunder may obtain release by habeas corpus. *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. at page 1024 (9, 10); *Mackey v. Miller*, 121 F. 161; *Rober-son v. Johnston*, 118 F. 2d 998.

There may be some insistence that appellant waived his constitutional right to trial by jury, but we submit that the trial court cannot so show, nor do the records (Docket entries and exhibit (T. 10-14)), disclose any such waiver, in writing, or by consent of this appellant. It should be pointed out here that:

“Courts should indulge every reasonable presumption against a waiver of fundamental constitutional rights and see if such acquiescence is justified by the facts of the case.”

The determination of whether there has been an intelligent waiver in any particular case must devolve upon the particular facts surrounding the circumstances of each individual case.

To preserve the protection accorded by the bill of rights for hard pressed defendants, the Courts are presumed to indulgently scrutinize, with meticulous care, the waiver of a constitutional right. No semblance of any such solicitude for the protection of his rights, was shown for this appellant, by the trial court, nor was he informed of the consequences, thereupon. Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. No such concern on the part of the trial court for the basic rights of appellant is

disclosed by the record. To the contrary, notwithstanding, it is totally silent as to an intelligent and competent waiver (in writing or orally made by this appellant), and similarly silent as to being informed of the consequences contingent upon the waiving of trial by jury.

Speaking of the obligation of the trial court to preserve the right to jury trial for an accused Mr. Justice Sutherland said that such duty—

“Is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from any of the essential elements thereof, and with a caution increasing in gravity.”

Patton v. United States, 281 U.S. 276, 312, 313, 74 L. Ed. 854, 869, 870, 50 S. Ct. 253, 70 A.L.R. 263.

AUTHORITIES IN SUPPORT OF APPELLANT'S ARGUMENT.

Appellant desires to submit, not in the order of their importance, but in chronological sequence, the leading, and we feel controlling authorities directly in point with appellant's contention.

Callan v. Wilson, 127 U.S. 540, 557, 32 L.Ed. 223, 228, 8 S. Ct. 1301, 1307,

which was a criminal prosecution by information in the police court of the District of Columbia. The accused claimed the right of trial by jury was secured to him

by the Third Article of the Constitution, as well as the Fifth and Sixth Amendments. The contention of the Government that the accused was not entitled to trial by jury was overruled, the United States Supreme Court saying:

“As the guaranty of a trial by jury, in the third Article, implied a trial in that mode, and according to the settled rules of the common law, the enumeration, in the Sixth Amendment, of the rights of the accused in criminal prosecutions, is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the States to have in the supreme law of the land, and so far as the agencies of the general government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty, and property.”

The court further said at page 1307—8 S. Ct.:

“Except in that class or grade of offenses called petty offenses, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guaranty of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority, of the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offense charged.”

This decision has been cited thirteen times since its rendition; it has never been modified, reversed, limited, or expressly overruled; it was cited and approved in *Thompson v. State of Utah*; the case following.

In *Thompson v. State of Utah*, 170 U.S. 343, 18 S. Ct. 620, wherein Thompson and a co-defendant were found guilty of grand larceny by a jury of twelve while Utah was still a territory. A new trial having been granted, the case was remanded for trial to another county. But it was not again tried until after the admission of Utah into the Union as a state.

At the second trial the defendant was found guilty. He moved for a new trial upon the ground that the jury who tried him was composed of only eight jurors; whereas by the law in force at the time of the commission of the alleged offense, a lawful jury in his case could not be composed of less than twelve jurors. The judgment of conviction was affirmed by the Supreme Court of the State of Utah, holding that the conviction by a jury of eight persons was consistent with the Constitution of the United States (50 Pac. 409).

The case was appealed to the United States Supreme Court who reversed for the following reasons:

“By the statutes of the territory of Utah in force at the time of the commission of the offense it was provided that a trial jury in a district court should consist of twelve—unless the parties to the action or proceeding, in other than criminal cases, agreed upon a less number; that a felony was a crime punishable with death or by imprisonment in the penitentiary, every other crime being a misdemeanor:—that no person should be convicted of a public offense unless by the verdict of a jury, accepted and recorded by the court, or upon a plea of guilty—a jury having been waived in a criminal action not amounting

to a felony; and that issues of fact should be tried by jury. * * *

“* * * When Magna Charta declared that no freeman should be deprived of life, etc., but by the judgment of his peers or by the law of the land, it referred to a trial by twelve jurors. Those who had emigrated to this country from England brought with them this great privilege.

‘As their birthright and inheritance, as a part of, that admirable common law which had fenced around and interpreted barriers on every side against the approaches of arbitrary power.’

“It must consequently be taken that the word ‘jury’ and words ‘trial by jury’ were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument; and that when Thompson committed the offense of grand larceny in the territory of Utah—which was under the complete jurisdiction of the United States for all purposes of government and legislation—the supreme law of the land required that he should be tried by a jury composed of not less than twelve persons.

“The natural life, says Blackstone, cannot legally be disposed of or destroyed by any individual, neither by the person himself nor by any other of his fellow creatures, merely upon their own authority.

“1 Bl. Comm. 133. ‘The public has an interest in his life and liberty neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceed-

ings involving the deprivation of life and liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods.

“The judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.”

This case has been cited innumerable times, and has never been modified, reversed, limited, expressly overruled, or publicly criticized, nor questioned. It has been distinguished and is much in prominence, in *Patton v. United States*, *infra*.

The next case in point with appellant's contention seems to be:

Schick v. United States, 195 U.S. 65, 24 S. Ct. 826.

While it is true the plaintiffs in error were severally prosecuted by information in the District of Northern Illinois, only upon a petty offense in which proceeding they, IN WRITING, WAIVED THE RIGHT TO JURY TRIAL, yet the United States Supreme Court said on page 826:

“The waiver of a jury was not assigned as error, nor referred to by counsel at the hearing before us, either in brief or argument. The question of its effect upon the judgment was suggested by this court, and briefs were called for from the respective parties.

“In such a case there is no constitutional requirement of a jury. In the 3rd clause of Section

2, Article 3, of the Constitution, it is provided that—

“ ‘The trial of all crimes, * * * shall be by jury’; and in Article 6 of the amendments, that ‘in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury * * *.’

“In the light of this definition we can appreciate the action of the convention which framed the Constitution. In the draft of that instrument, as reported by the committee of five, the language was ‘* * * the trial of all criminal offenses * * * shall be by jury’, but by unanimous vote it was amended so as to read—‘the trial of all crimes’. The significance of this change cannot be misunderstood.”

And on page 828 the court continues:

“There is no public policy which forbids the waiver of a jury in the trial of petty offenses.

“In all prosecutions within the jurisdiction of said court, in which, according to the Constitution of the United States, the accused would be entitled to a jury trial, the trial shall be by jury, unless the accused shall in open court, expressly waive such trial by jury, and request to be tried by the judge * * *. In all cases where the accused would not, by force of the Constitution of the United States, be entitled to trial by jury, the trial shall be by the court without a jury, unless * * * imprisonment as punishment for the offense may not be thirty days or more, the accused shall demand a trial by jury, in which case the trial shall be by jury.”

In the dissenting opinion of Mr. Justice Harlan in this case at page 829 we find:

“Upon the face of the record the question arises whether the court below, without the aid of a jury, had jurisdiction to ascertain the facts, and, finding the defendants severally guilty of the offense charged, to impose upon each the fine prescribed by the statute.

“So, in ascertaining whether, under any circumstances, a criminal case may be tried in a Federal court without a jury, * * * the accused pleading not guilty, * * * We must inquire whether the Constitution forbids such an exercise of authority by the court, without a jury. If it does, that is the end of the matter; if it does not, then, and then only, may we look to such usage and modes of proceeding as existed at the common law for the trial of crimes before the adoption of the Constitution.

“Proceeding on that basis, we have seen that the Constitution expressly requires that the trial of all crimes, except impeachment, shall be by jury; and we assert, with confidence, that no precedent can be found at common law for the trial by the court, without a jury, of any crimes except those described in adjudged cases and by elementary authorities as minor or petty offenses involved in the internal policy of the State, and those could be tried summarily by some court or officer, without the intervention of a jury, * * *.”

and on page 832 Mr. Justice Harlan continues in no uncertain language:

“What the Constitution requires is that the trial of a crime shall be by jury. If the accused pleads not guilty, there must, of necessity, be a trial; for by that plea he puts ‘himself on his country, which country the jury are’, he contests, by that plea, every fact necessary to establish his guilt; he is presumed to be innocent; nothing is confessed; and the facts necessary to show guilt must be judicially ascertained, in the mode prescribed by law, before any judgment can be rendered, but the vital inquiry is, in what way, when defendant pleads not guilty, are the facts to be ascertained, and the plea of not guilty overcome? Under the express words of the Constitution the answer must be: by trial before a jury of twelve persons, organized to determine whether the charge of guilt be true; the function of the court being simply to conduct the trial, and render a judgment in accordance with the verdict of the jury, not separately, but together, constitute the appointed tribunal, which alone, under the law, can try the question of crime, the commission of which by the accused is put in issue by a plea of not guilty.”

While it is true this case has been affirmed, but the Court so ruled, by the appearance in the record of the WAIVER, SIGNED IN WRITING, BY THE PLAINTIFFS, WAIVING THEIR CONSTITUTIONAL RIGHT TO TRIAL BY JURY. That one also could waive such right in a petty offense.

The case has been cited with approval numerous times, and nowhere do we find any criticism against the opinion expressed therein; particularly upon the

point—"TRIAL BY JURY". It seems to fully apprehend the edicts embodied in Article III, and the Sixth Amendment to the United States Constitution.

Undoubtedly the longest case of record direct in point with appellant's contention is:

Freeman v. United States (C. C. A. 2d, 1915),
227 Fed. 732.

The defendants by a writ of error appealed claiming as error, among other things, that he did not have a trial by a jury—page 742, 227 Fed. The trial in many respects was a remarkable one, lasting four months; the record is contained in ten large volumes of 7000 printed pages. Rogers, Circuit Judge, delivered the opinion of the court. Speaking upon the subject—"trial by jury * * *" We quote in part page 742:

"The Constitution of the United States as originally adopted provides in the third article as follows:

'The trial of all crimes, except in cases of impeachment, shall be by jury.'

"The first Congress, however, in September 1789, proposed to the Legislature of the several States ten amendments, which were promptly ratified. The Fifth Amendment provides that:

" 'No person shall be * * * deprived of life, liberty, or property, without due process of law.'

"The Sixth Amendment provides that:

" 'In all criminal prosecution the accused shall enjoy the right to a speedy and public trial, by an impartial jury.'

“All the above provisions operate simply as restraints and limitations upon the powers of the Government of the United States. But as the State Constitution also secure to persons accused of crime a right to a trial by jury under provisions more or less similar, the decisions of State Courts, as well as those of the Federal Courts, may be consulted in seeking to discover the meaning of the constitutional guaranty.

“The right to trial by jury has been placed in this country upon what Mr. Justice Story in his commentaries calls ‘the high ground of constitutional right’, and he declares that the inestimable privilege of trial by jury is conceded by all ‘to be essential to political and civil liberty’. The right is one justly dear to our people, and as a social, political, and judicial institution it is deserving of the solicitude with which it has been regarded by all Anglo-Saxon people.

“The defendant is accused of a crime for which he is entitled to trial by jury within the meaning of the third article of the Constitution of the United States. The Supreme Court in *Callan v. Wilson*, 127 U.S. 540, 8 S. Ct. 1301, 32 L. Ed. 223 (1888), construed that article as embracing, not only felonies punishable by confinement in the penitentiary, but also some classes of misdemeanor, the punishment of which may involve the deprivation of the liberty of the citizen.

“The Supreme Court of the United States has expressed the same idea. In *Capital Traction Co. v. Hof*, 174 U.S. 1, 13, 19 S. Ct. 580, 585, 43 L. Ed. 873 (1889), the court said:

“ ‘Trial by jury, in the primary and usual sense of the term at the common law and in the

American Constitution, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law of the evidence. This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion.' ”

Circuit Judge Rogers continues on page 744—227 Fed.:

“It being settled that an accused is entitled under the Constitution to trial by jury, and that trial by jury involves in the federal courts a trial by twelve men presided over by a judge, it is necessary to consider whether one accused of crime can consent or waive his constitutional rights as to the tribunal by which he is to be tried.

“As the Constitution specifically declares that ‘the trial of all crimes * * * Shall Be By Jury’, it is difficult to see how it can be maintained that the trial of a crime in a federal court need not be by jury, provided the accused person consents to be tried in some other manner. The question of how he shall be tried does not seem open to his determination but appears to have been settled for him by the mandatory provision of the Con-

stitution of the United States, however it might be under the Constitution of a State differently worded. It is necessary, too, to have in mind that the trial of one charged with crime, affects not merely the rights of the accused but the public interest * * *.

“The Declaration of Independence declares that all men are endowed by their creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness. In his great work on constitutional limitations, p. 576, Judge Cooley, discussing waiver of rights, said that:

“ ‘Consent in a criminal case cannot bind the defendant “since criminal charges are not the subject of arbitration, and any infliction of criminal punishment upon an individual, except in pursuance of the law of the land is a wrong done to the State, whether the individual assented or not.”

“ ‘In *Law v. United States*, 169 Fed. 86, 94 C. C. A. 1st (1939), Mr. Justice Lurton said:’

“ ‘The right to waive a right does not exist where the matter concerns the public as well as the individual * * *

“ ‘* * * It is not competent for the accused and the district attorney to change by consent the constitution of the tribunal provided for trial of crimes. Between the waiver of a jury in a civil case and its waiver in a trial for crimes there are fundamental differences. The one involves only property rights of the parties, rights over which they have dominion. The other involves the liberty

or life of the citizen. This is a matter over which the accused has not dominion. The State, the public, are concerned that neither shall be affected save by due process of law.' ”

“It may be conceded”, continues Judge Rogers in *Freeman v. United States*, page 747: “too, that the right to a jury trial may be waived in trials of persons accused of minor offenses. The constitutional provisions do not extend the right to a jury trial. They only secure it in the cases in which it was a matter of right of common law. Cooley on Constitutional Limitation (7th Ed.) p. 590. Thus in *Schick v. United States*, 195 U.S. 65, 24 Ct. 826, 49 L. Ed. 99, 1 Ann. Cas. 585 (1904), the Supreme Court held that a written waiver of a jury by a person prosecuted by information for the violation of a revenue statute was not in conflict with the constitution of the United States, providing that the trial of all crimes shall be by jury. The decision went upon the ground that the constitutional provision did not apply to petty offenses, and, that being the case, no reason existed why the defendant could not waive trial by jury and consent to trial by the court.” (IN A PETTY CASE.)

Circuit Judge Rogers goes into page after page of authorities upon this point and clearly, but firmly, illustrates why one charged with a crime CANNOT WAIVE HIS RIGHT OF TRIAL BY JURY. This case has been cited with approval twelve times since its rendition, and has never been modified, criticized, or expressly overruled.

Many authorities hold that the point was necessarily settled by the Supreme Court in

Patton v. United States, 281 U.S. 276, 50 S. Ct. 253, 74 L. Ed. 854, 70 A. L. R. 263.

This conception seems to be a misapprehension as to the applicable facts.

The defendant with his co-defendants were on trial in the District of Oklahoma. During the process of the trial one juror took sick and was excused. The defendants, after a consultation with the judge, district attorney and counsels for defense, all agreed to proceed with an eleven man jury. But the defendants, individually, SIGNED SUCH A WAIVER IN WRITING WITH THE APPROVAL OF THE JUDGE PRESIDING.

Upon the appeal of the case, the Appellate Court did not feel capable of answering the question, so it was certified to the United States Supreme Court, which held, in substance, that the accused might lawfully consent to a jury of less than twelve.

Practically there is much difference between being tried by a jury of eleven, or six, or for that matter even three, and being tried by a judge. The institution of trial by jury—especially in criminal cases—has its hold upon public favor chiefly for two reasons. The individual can forfeit his liberty—to say nothing of his life—only at the hands of those who, unlike any official, are in no wise accountable directly or indirectly, for what they do, and who at once separate and melt anonymously in the community from which they

came. Moreover, since if they acquit their verdict is final, no one is likely to suffer of whose conduct they do not morally disapprove; and this introduces a slack into the enforcement of law and justice, tempering its rigor by the mollifying influence of current ethical convention. A trial by any jury, however small, preserves both of these fundamental elements and a trial by a judge preserves neither, at least to anything like the same degree.

Be that as it may, in any event the court in *Patton v. United States*, supra, was plainly concerned to protect even that measure of surrender which had been made in the case before it, as a competent waiver of a constitutional right EXPRESSLY MADE IN WRITING. They meant the consent to be jealously scrutinized; they did not mean to impose upon the defendants the same responsibility for their choice as rests upon them in ordinary affairs. It appears that we should treat it as a critical circumstance—at least when the accused's right to any jury whatever is denied.

To continue with the Supreme Court's opinion in *Patton v. United States*, page 254:

“Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses. In such cases the value and appropriateness of jury trial have been established by long experience, and are not now to be denied. Not only must the right of the accused to a trial by a constitutional jury be jealously preserved,

but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our tradition that before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant * * *."

The gist of the ruling in this case, *supra*, *Patton v. United States*, is—that—

"an accused charged with a serious federal crime may dispense with his constitutional right to jury trial, where this action is taken with his express, intelligent consent, where the government also consents, and where such action is approved by the responsible judgment of the trial court. But whether or not there is an intelligent, competent, self-protecting waiver of jury trial by an accused must depend upon the unique circumstances of each case."

In the instant case the appellant was denied this self-protecting shield, and in a unique, subtle way was swiftly pronounced guilty.

The *Patton* case has been cited as a finality and the law upon the subject. It has often been quoted whenever such a controversy arose. It has never been modified, reversed, disapproved, criticized or expressly overruled. It is quoted extensively in the dissenting opinion in the case following.

A lot of legal publicity has been allotted to the case of

Adams v. United States, 63 S. Ct. 241.

The facts are as follows:

McCann, himself a law student, charged with using the mails to defraud, moved to have the case tried without a jury by the judge alone. There was a brief discussion between the court, the petitioner, and Assistant United States Attorney, after which McCann submitted the following over his signature:

“I, Gene McCann, the defendant herein, appearing personally, do hereby waive a trial by jury in the above entitled case, having been advised by the court of my constitutional rights.”

The Assistant United States Attorney consented and the judge (one of long trial experience and tested solicitude for the civilized administration of criminal justice) entered an order approving this “waiver”.

The Circuit Court of Appeals, Second Circuit reversed the lower court 126 F. (2d) 774, holding at page 775:

“It will have been at once observed that if the right of trial by jury is one which the accused may surrender as he may surrender any other privilege or right, the relator unconditionally surrendered it. Not only did he do this expressly after his rights had been explained to him, and never afterwards recant; but he was actually the moving party, for it was he who asked the judge to try him. Furthermore, there is reason

to suppose that in fact he did not suffer by submitting his guilt to a judge rather than a jury—but has an accused,—the power at his own instance to surrender his right to trial by jury when indicted for felony? Since the case of *Patton v. United States*, 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. 854, 70 A. L. R. 263, the surrender of that right has not been before the Supreme Court, but we are to assume that, that decision is still law, at least as to the point actually decided, which was that the accused might lawfully consent to a jury of less than twelve—eleven as it chanced. It is quite true that the opinion proceeded upon broader grounds.

“* * * Limiting ourselves therefore to the exact situation before us, we hold that when on trial for a felony, the accused—at least when not himself a lawyer—may not consent to be tried by a judge.”
Relator discharged.

The Supreme Court (63 S. Ct. 236) reversed the above decision holding in substance:

“The relation of trial by jury to civil rights—especially in criminal cases—is fully revealed by the history which gave rise to the provisions of the Constitution which guarantee that right. Article III, Section II, Clause III; Sixth Amendment; Seventh Amendment. That history is succinctly summarized in the Declaration of Independence in which complaint was made that the Colonies were deprived ‘in many cases, of the benefits of trial by jury,’ but procedural devices rooted in experience were written into the Bill of Rights not as abstract rubrics in an elegant code,

but in order to assure fairness and justice before any person could be deprived of 'life, liberty, or property.'"

In the same opinion Mr. Justice Douglas (63 S. Ct. page 243), dissenting, states in part:

"The Patton case—supra, held that a defendant represented by counsel might waive under certain circumstances trial by a jury of twelve and submit to trial by a jury of eleven. In view of the strictness of the constitutional mandates I am by no means convinced that it followe that an entire jury may be waived * * *.

"Furthermore, the right to trial by jury, like the right to have the assistance of counsel, is 'too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.'

"Moreover, as Judge Learned Hand stated in the court below (126 F. (2d) 774, 776), the answer to the question whether the waiver was intelligent should hardly be made to depend on 'the outcome of a preliminary inquiry as to the competency' of the particular layman. If this constitutional right is to be jealously protected, there should be a reliable objective standard by which the trial court satisfies itself that the layman who waives trial by jury in a case like this has a full understanding of the consequences.

"The question for us is not whether a judge be trusted as much as a jury to determine the question of guilt. We are dealing here with one of the great historic civil liberties—the right to trial by

jury. Article III, Sec. II and the Sixth Amendment which grant that right contains no exception, though a few have been implied. See *Ex parte Quirin*, 317 U. S., 63 S. Ct. 2, 87 L. Ed. We should not permit the exceptions to enlarge by waiver unless it is plain and beyond doubt that the waiver was freely and intelligently made.

“The fact that a defendant ordinarily may dispense with a trial by admitting his guilt is no reason for accepting this layman’s waiver of a jury trial. What the Constitution requires is that the ‘trial’ of a crime ‘Shall be by jury.’ Art. III, Sec. II, and it specifies the machinery which shall be employed if a plea of not guilty is entered and the prosecution is put to its proof * * *.”

Mr. Justice Murphy, also dissents in the same case, *Adams v. U. S.*, 63 S. Ct., at page 245. He states:

“The Constitution provides: ‘The trial of all crimes, * * * shall be by jury; * * *’ (Article III, Sec. II), and: ‘In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, * * *.’ (Amendment VI.) Because of these provisions, the fundamental nature of jury trial, and its beneficial effects as a means of leavening justice with the spirit of the times is admirably stated by Judge Learned Hand below, 126 F. (2d) 774, 776. I do not concede that the right to a jury trial can be waived in criminal proceedings in the federal courts. Whatever may be the logic of the matter, there is a considerable practical difference between trial by

eleven jurors, the situation in *Patton v. United States*, 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. 854, 70 A. L. R. 263, and trial to the court, practicality is a sturdy guide to the preservation of Constitutional guaranties.”

This case, *Adams v. United States*, is used by appellant, chiefly because of the waiver signed by McCann, which we quoted on page 38, supra.

Appellant respectfully wishes to call the Honorable Court’s attention, to this signed waiver, and also the one in the *Patton* and *Schick* cases; all three being classified as a competent, intelligent waiver of a known right. This cannot be said of the instant case (T. 14), neither can it be said this appellant was informed as to the rights available to him.

The Honorable Circuit Judge Hutcheson, of the Fifth Circuit Court of Appeals, said in *Dillingham v. United States*, 76 F. (2d) 36 at page 39:

“When, as here, defendant brings up a record which shows that he has not had the trial by jury which the Constitution guarantees, if waiver is relied on for affirmance, * * * the record must clearly show that the waiver was formally and legally obtained upon a full explanation and understanding of his rights. It must show, too, that the following trial has been a fair one, conducted with a scrupulous regard for defendant’s legal rights.”

CONCLUSION.

In point one appellant has shown how the issue raised by his petition for Habeas Corpus was circumvented by the United States District Court for the Northern District of California.

In point two he factually showed how this District Court sanctioned a procedure unknown in Habeas Corpus proceedings.

In point three he authoritatively showed, so we feel, abundant reason why, under the given circumstances of this case, a jury trial could not be waived in this appellant's case. He did not enter into any stipulation to waive a jury: nothing was explained to him; neither had he a sufficient understanding of his rights, and the court acted under circumstances which deprived his assent of that free volition essential to a jury waiver. The whole proceeding was in aberration from trial rules; it was so lacking in the essentials of a fair trial, and especially in those safeguards to which a defendant is entitled; that the stigma of a grave travesty upon appellant's constitutional right is apparent.

IT IS TO BE REMEMBERED THE RECORDS ARE ABSOLUTELY BARREN OF ANY INTELLIGENT, COMPETENT, OR VOLUNTARY WAIVER OF TRIAL BY JURY MADE BY THIS APPELLANT.

Appellant respectfully wishes to submit, that it is his belief, the facts and the laws involved, warrant a remand, and entitles him to a hearing for the ascertainment of the issue, in conformity with the prayer in his original petition for the writ of Habeas Corpus.

Dated, Alcatraz Island, California,

March 19, 1945.

RALPH SWIHART,

Appellant in Propria Persona.

No. 10,969

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RALPH SWIHART,

Appellant,

VS.

JAMES A. JOHNSTON, Warden, United States
Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

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FILED

MAY 15 1945

PAUL P. O'BRIEN,
CLERK

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IN THE

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Appellant,

VS.

JAMES A. JOHNSTON, Warden, United States
Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California denying appellant's petition for writ of habeas corpus. (T. 30.) The District Court had jurisdiction of the habeas corpus proceedings under Title 28 U.S.C.A., Sections 451, 452 and 453. Jurisdiction to review the District Court's order denying the petition is conferred upon this Court by Title 28 U.S.C.A., Sections 463 and 225.

FACTS OF THE CASE.

The appellant, an inmate of the United States Penitentiary at Alcatraz, California, filed a petition for writ of habeas corpus in the Court below (T. pp. 2-16), in which he alleged in substance that his imprisonment by appellee was illegal because the trial Court deprived him of the right of trial by jury. The Court below issued an order to show cause (T. 17) and the appellee filed a motion to dismiss the petition on the ground that the said petition, when considered in conjunction with the record in the prior petition, in case number 23016-R (decided adversely to the appellant—see memorandum opinion of Judge Michael J. Roche, T. pp. 41-46) was insufficient to justify the issuance of a writ of habeas corpus. (T. pp. 17-18.) Appellant thereupon filed a memorandum in opposition to appellee's motion to dismiss petition for writ of habeas corpus. (T. pp. 19-30.) Thereafter the Court below filed the following order denying petition for writ of habeas corpus:

**“ORDER DENYING PETITION FOR WRIT
OF HABEAS CORPUS AND DISMISS-
ING PETITION.**

The verified petition for writ of habeas corpus filed herein on August 23, 1944, in substance alleges that petitioner is unlawfully deprived of his liberty by respondent because his conviction in the United States District Court of the Eastern District of Oklahoma for violation of 18 U.S.C.A. 409 was contra to the Fifth Amendment of the Constitution in that despite his demand for jury

•

trial, he was denied the same and was tried and convicted by the Judge of the Court.

Ordinarily such an allegation would present a factual issue requiring the issuance of the writ and a hearing thereon.

The court issued an order directed to respondent requiring him to show cause why the writ should not issue. Respondent, in response, moved to dismiss the petition, alleging that on December 16, 1943, petitioner filed a verified petition for writ of habeas corpus herein (23016-R) wherein he asserted among many other matters, that he waived a jury trial in the Oklahoma case, in reliance upon an alleged promise, that if he were found guilty by the court, probation would be granted him. Upon hearing before Judge Roche in case #23016, petitioner abandoned the foregoing contention and introduced no evidence in support thereof. Judge Roche made written findings to such effect and dismissed the petition.

Thus petitioner under oath, has alleged in one petition that he waived a jury and in another petition that he was refused a jury despite his demand therefor. The writ of habeas corpus cannot be availed of to serve the purposes of a petitioner who has so little regard for the truth.

While the doctrine of res adjudicata does not apply in habeas corpus proceedings, nevertheless the court may deny the petition in reliance upon a prior refusal to issue a writ to the same applicant. *Salinger v. Loisel*, 265 U. S. 224. *Mothershead v. King*, 37 Fed. Suppl. 210. Furthermore the issue raised herein could have been disposed of in case

#23016-R, but was abandoned, U. S. ex rel. Bergdoll v. Drum (Cir. 2), 107 Fed. (2d) 897.

The petition for writ of habeas corpus is denied and the petition is dismissed.

Dated, October 3, 1944.

Louis E. Goodman,

United States District Judge.

Filed Oct. 3, 1944."

(T. pp. 30-32.)

QUESTION.

Was the Court below under an obligation to produce the body of appellant before it to determine if he was entitled to a discharge?

CONTENTION OF APPELLEE.

The answer to the above stated question is "No".

ARGUMENT.

On the record before it the Court below was under no obligation to issue the writ and properly decided the merits of appellant's petition on order to show cause.

The Supreme Court of the United States in the case of

Walker v. Johnston, 312 U. S. 275,

approved the practice of issuing the order to show cause to determine whether issues of fact emerging from the pleadings warranted a hearing on habeas corpus, as provided in the habeas corpus statutes. See also

Lovvorn v. Johnston (CCA-9), 118 F. (2d) 704.

In

Salinger v. Loisel, 265 U. S. 244,

it was held by the Supreme Court that a prior refusal to discharge on a like application may be considered, and even given, controlling weight. Here the Court below properly refused the appellant the relief sought on the ground that the issue which he raised in the instant petition, to-wit, deprivation of trial by jury, was the same issue he raised in his petition before his Honor Judge Roche. Appellant denies in his opening brief that he raised the issue of his alleged deprivation of trial by jury before Judge Roche. A reading of the opinion of Judge Roche, above referred to, conclusively shows otherwise.

To summarize, appellee believes that the opinion of the Court below adequately and aptly expresses any arguments he might advance, and accordingly in reliance on this opinion, the reasoning therein, and the authorities cited, he rests his case.

CONCLUSION.

In view of the foregoing, it is respectfully submitted that the order of the Court below denying petition for writ of habeas corpus is correct and should be affirmed.

Dated, San Francisco, California,

May 14, 1945.

FRANK J. HENNESSY,

United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,

Attorneys for Appellee.



